No. 89-40

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

RICHARD DELMER BOYER,

Respondent

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the subjective beliefs of an individual contacted by the police have any bearing on whether the individual was seized within the meaning of the Fourth Amendment or evidence subsequently obtained is admissible as a fruit of the contact?

2. Whether a blurted out admission of culpability to a double murder by respondent as the police officer was leaving the room when respondent had previously invoked his *Miranda* rights constitutes an initiation of conversation within the meaning of *Edwards v. Arizona* (1981) 451 U.S. 477, and the plurality and dissenting opinions in *Oregon v. Bradshaw* (1983) 462 U.S. 1039?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court

of California issued on March 13, 1989, reversing the judgment in its entirety.[1]

OPINION BELOW

The opinion of the California Supreme Court (*People v. Boyer* (1989) 48 Cal.3d 247) appears as Appendix A of the petition. A copy of the California Supreme Court's order denying the petition for rehearing without opinion appears as Appendix B.

JURISDICTION

The judgment of the California Supreme Court was filed on March 13, 1989. A timely petition for rehearing by petitioner was denied on May 22, 1989. This petition is filed within 60 days of that judgment and is therefore timely.

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1. The parties to the proceedings below were petitioner, the People of the State of California (plaintiff and respondent below), and respondent, Richard Delmer Boyer (defendant and appellant below).

This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendments Four, Five, Six, and Fourteen; California Penal section 190.2.

STATEMENT OF THE CASE

Respondent was convicted in Orange County Superior Court of two counts of first degree murder (Pen. Code, §§ 187, 189), and two counts of robbery (Pen. Code, § 211). The jury sustained an allegation that respondent had used a deadly weapon, a knife in each of the offenses (Pen. Code, § 12022, subd. (b)). It also found as special circumstances under the 1978 death penalty law that respondent had been convicted of more than one murder in the proceeding (Pen. Code, § 190.2, subd. (a)(3)), and each of the murders was committed intentionally during

a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)). The jury fixed the punishment at death.

The appeal was automatic. The California Supreme Court reversed the judgment in its entirety finding respondent's statements had been obtained in violation of his Fourth Amendment rights and *Miranda v. Arizona* (1966) 384 U.S. 436. (*People v. Boyer, supra*, 48 Cal.3d at pp. 255-256; Appen. pp. A-1-A-3.)

STATEMENT OF FACTS

A. The Crimes

On December 7, 1982, Francis and Eileen Harbitz, an elderly Fullerton, California, couple were robbed and stabbed to death in their home.

Respondent knew the victims' son. On several occasions he had helped around the house and owed them money. He had been at the victims' residence about four months

before the killings, but not thereafter. However, the week before the killings respondent called the victims' son several times. In one call he indicated he was struggling to survive financially. (*People v. Boyer, supra*, 48 Cal.3d at p. 256; Appen. pp. A-3-A-4.)

John Kennedy testified he and respondent went to the victims' residence. At respondent's direction Kennedy parked on a side street and waited while respondent crossed a yard and disappeared. Respondent was wearing a knife in a sheath. After 45 or 50 minutes, respondent returned carrying a towel. When a police or security car passed by, respondent used the towel to wipe off the rear window.

Respondent told Kennedy to drive off without attracting attention. Respondent had a blood spot on his knife. Respondent said he had been stabbed in the leg by

dope dealers. Respondent eventually threw two wallets out of the car and paid Kennedy some money he owed him. (*People v. Boyer, supra*, 48 Cal.3d at p. 257; Appen. pp. A-5-A-6.)

Respondent's girlfriend, Cynthia Cornwell, testified respondent had no money before December 7, 1982. That evening he returned home with a stab wound, but had some money.

On December 14, 1989, he told her he had done something that would make her mad at him. Later that evening Fullerton detectives arrived at the residence and asked respondent to accompany them to the station for an interview. Cornwell later gave police consent to search the residence. Before the police had arrived, she burned a light jacket respondent had worn on December 7. (*People v. Boyer, supra*, 48 Cal.3d at p. 257; Appen. pp. A-6-A-7.)

A search of the residence revealed pants stained with blood similar to that of the victims. A bloodstained knife was also seized from the residence. The stains on the knife were of human origin, but were too small to allow closer analysis.

While at the police station, respondent admitted killing the victims. He later showed the police where one of the wallets had been discarded. (*People v.Boyer, supra*, 48 Cal.3d at pp. 258-259; Appen. pp. A-8-A-13.)

Respondent presented evidence of extensive drug use and claimed to have been in a "fog" while in the house. He did not know how the victims had been killed. (*People v. Boyer, supra*, 48 Cal.3d at pp. 259-262; Appen. pp. A-13-A-20.)

In rebuttal the prosecution introduced a stipulated statement to the

following effect: "On December 15, 1982, the day after the taped statement, Fullerton Detectives Allred and Lewis again interviewed respondent. At that time, respondent said he remembered stabbing Mr. and Mrs. Harbitz more than once, but he could not say how many times. Defendant also admitted knowing before he left the Harbitzes' home that he had killed them, and he again expressed remorse." (*People v. Boyer*, *supra*, 48 Cal.3d at p. 262; Appen. pp. A-20-A-21.)

B. Circumstances Surrounding the Interrogation

At 5:30 p.m., on December 14, Detectives Allred and Lewis met at respondent's El Monte residence with Officers Scroggins and Fentress of the El Monte police force. Lewis had Scroggins and Fentress cover the rear of the house while he and Allred knocked on the front

door. It was understood respondent would be detained if he attempted to flee. Lewis told the other officers he lacked probable cause to arrest respondent and was seeking a voluntary interview with respondent. (*People v. Boyer, supra,* 48 Cal.3d at p. 263; Appen. pp. A-25-A-26.)

Lewis knocked on the front door and identified himself. Respondent went out the back door and was stopped by Scroggins and Fentress. Scroggins identified himself as a police officer, asked respondent to step into the driveway, and told him two gentlemen in front wanted to speak with him. The El Monte officers had commanded respondent to halt when he came out of the door. (*People v. Boyer, supra,* 48 Cal.3d at p. 263; Appen. pp. A-26-A-27.)

Lewis asked respondent if he would voluntarily come to the Fullerton police

station for an interview. Respondent agreed. He testified he did so because he thought he would have to go anyway and did not want to create a scene in front of Cornwell.

Respondent asked if he could go in and get a shirt before leaving with the officers. Lewis agreed, and the officers followed respondent inside. Lewis went into the house because he wanted to keep respondent in sight. (*People v. Boyer, supra*, 48 Cal.3d at p. 264; Appen. pp. A-23-A-28.)

Inside the house, Cornwell asked if she could accompany respondent to the station. Lewis said she could go, but she was unable to arrange child care. Lewis explained that respondent would be gone about three hours, including the one hour of interview time and two hours of travel.

Before entering the police car, respondent was frisked for weapons. Lewis

told respondent to "have a seat in the back," and respondent did so. Lewis and Allred got into the front seat. There was no cage between the front and rear. Respondent was not handcuffed and the car doors were not locked. During the one-hour drive from El Monte to Fullerton, Lewis told respondent they were investigating a homicide and would not take statements until they reached the station. (*People v. Boyer*, *supra*, 48 Cal.3d at p. 264; Appen. pp. A-28-A-29.)

At the station, respondent was advised of his *Miranda* rights. After several minutes, respondent continued to protest his innocence. Lewis repeatedly proclaimed the police could prove respondent had committed the homicides and respondent was "gonna fall on this one." Lewis told respondent that he had evidence of which respondent was unaware and they could place him at the scene. He also had

said respondent's lies would not make the situation go away.

Respondent continued to deny his guilt while Lewis told him to show "damn conscience" and to help the police "understand" his actions. During this period respondent asked several times if he was under arrest. Lewis evaded the questions and continued the interrogation. Respondent made several equivocal remarks about wanting a lawyer. At 8:49 p.m., respondent indicated he did not want to talk further. Lewis ended the questioning. (*People v. Boyer, supra,* 48 Cal.3d at p. 265; Appen. pp. A-29-A-31.)

After leaving the room for a few moments, Lewis returned and asked respondent to consent to a search of the El Monte residence. Respondent agreed to the search only if Cornwell also gave

permission since it was her house. Cornwell eventually consented.

Lewis returned to the room and asked respondent if police could fingerprint him for elimination purposes. Respondent agreed, but asked again if he was under arrest. Lewis said he was not under arrest. Respondent did not recall the conversation. Respondent testified he was handcuffed during the trip to the jail, the officers denied it. (*People v. Boyer, supra*, 48 Cal.3d at pp. 265-266; Appen. pp. A-32-A-34.)

Thereafter, Cornwell called and spoke to respondent. She asked him if it was all right to consent. He told her it was her decision since it was her house and it was all right with him. Respondent told Cornwell he was being charged with two counts of murder. Lewis was shocked and surprised since respondent had not been

placed under arrest. (*People v. Boyer, supra*, 48 Cal.3d at p. 266; Appen. pp. A-34-A-35.)

When respondent completed the conversation, Lewis invited him back into the interrogation room to tell him a few things. Lewis said since respondent had asked for an attorney, he was not there to solicit any statements from him, but wanted him to understand a few things.

While respondent had been fingerprinted, the detectives had telephoned one of the victims' sons and obtained some additional information. Lewis then said he did not know whether respondent was involved and was telling the truth, but would check into the case further. (*People v. Boyer, supra*, at p. 266; Appen. pp. A-35-A-36.)

At this time, Lewis turned to leave the room intending to arrange transportation home for respondent. At

this point respondent shouted, "Hey, wait a minute. Come back here and sit down. You're right, I can't live with it. I did it. I didn't mean to do it. But I did it." (*People v. Boyer, supra*, 48 Cal.3d at p. 267; Appen. pp. A-36.)

Lewis reactivated the recorder and took a waiver of respondent's *Miranda* rights, during which respondent remarked he could not afford an attorney. Respondent then confessed. (*People v. Boyer, supra*, at p. 267; Appen. pp. A-36-A-37.)

Respondent was interviewed on December 15, 1982, and confessed again to the crimes. This confession was admitted at trial by stipulation of the parties. (*People v.Boyer, supra*, at p. 262; Appen. pp. A-20-A-21.)

C. Rulings of the California Supreme Court

1. The Supreme Court concluded respondent's statements were the fruit of an illegal arrest without a warrant or probable cause. (*People v.Boyer*, *supra*, 48 Cal.3d at p. 267; Appen. pp. A-37-A-42.)

2. Respondent's statements were obtained in violation of his *Miranda* rights as he was in custody for *Miranda* purposes when he made incriminating statements. (*People v. Boyer*, *supra*, at p. 272; Appen. pp. A-52-A-53.)

3. Respondent's spontaneous statements made as Lewis was leaving the room were not voluntary, but were obtained in violation of *Miranda*. (*People v. Boyer*, *supra*, at p. 274; Appen. p. A-59.)

4. The testimony of Kennedy, evidence obtained by reason of a search of the El Monte residence, and the discovery of the

wallet did not have to be suppressed. (*People v. Boyer, supra*, 48 Cal.3d at pp. 275-279; Appen. pp. A-64-A-75.)

5. Respondent's trial testimony was the fruit of the police illegality. (*People v. Boyer, supra*, at p. 280; Appen. pp. A-79-A-80.)

6. The remaining admissible evidence against respondent did not make admission of the illegally seized evidence harmless beyond a reasonable doubt. (*People v. Boyer, supra*, at pp. 279-280; Appen. pp. A-76-A-80.)

HOW THE FEDERAL QUESTION IS PRESENTED

In the Orange County, California, Superior Court, respondent moved to suppress evidence on the ground he was improperly seized within the meaning of the Fourth Amendment and his statements were the fruit of the unlawful seizure. He also argued his statements were

obtained in violation of his rights under *Miranda v. Arizona*, *supra*, 384 U.S. 436. The trial court denied the motions to suppress evidence on these grounds. (*People v. Boyer*, *supra*, 48 Cal.3d at p. 256; Appen. pp. A-2-A-3.)

The California Supreme Court concluded respondent had been improperly seized within the meaning of the Fourth Amendment when contacted by the police and when he went to the police station since the police did not have a warrant or probable cause. The court also concluded respondent's statements were the fruit of this unlawful conduct. (*People v. Boyer*, *supra*, at pp. 267-270; Appen. pp. A-37-A-46.) In reaching this conclusion the court rejected petitioner's contentions that the encounter between the police and respondent was consensual and not a detention. It also rejected petitioner's argument respondent's

statements were volunteered and not the fruit of any police illegality. (*People v. Boyer, supra*, 48 Cal.3d at pp. 267-270; Appen. pp. A-37-A-46.)

The court also concluded respondent's statements were obtained in violation of *Miranda v. Arizona, supra*, 384 U.S. 436, as his statements after he invoked his *Miranda* rights were not volunteered, but were the fruit of police interrogation techniques. (*Edwards v. Arizona* (1981) 451 U.S. 477; *Oregon v. Bradshaw* (1983) 462 U.S. 1039; *People v. Boyer, supra*, at pp. 272-275; Appen. pp. A-46-A-63.) In reaching this conclusion the court again rejected petitioner's contention respondent's statements had not been obtained in violation of *Miranda* as petitioner was not in custody for *Miranda* purposes and these statements were volunteered. (*People v. Boyer, supra*, at pp. 271-275; Appen. pp. A-46-A-63.)

Based on these conclusions the court reversed the judgment in its entirety. (*People v. Boyer*, *supra*, 48 Cal.3d at p. 256.)

Justices Panelli and Kaufman dissented from both holdings, concluding the majority had applied a subjective, rather than objective test, in determining respondent's Fourth Amendment rights were violated. These two justices also concluded respondent's *Miranda* rights had not been violated. (*People v. Boyer*, *supra*, at pp. 280-283; Appen. pp. A-81-A-90.)

Petitioner filed a petition for rehearing asserting that application of an objective, and not a subjective test, for determining whether there had been a seizure would lead to the conclusion respondent had been properly seized within the meaning of the Fourth Amendment. It

was also argued respondent's statements were not the fruit of any illegality.

Petitioner further argued respondent's statements had not been obtained in violation of *Miranda*. Rather, they were admissible as they were obtained after respondent invoked his rights, but then initiated further discussions with the police about the case. (*Edwards v. Arizona*, *supra*, 451 U.S. 477; *Oregon v. Bradshaw*, *supra*, 462 U.S. 1039.)

The petition for rehearing was denied on these grounds although the opinion was modified on other grounds. (See Appen. B pp. B-1-B-5.)

REASONS FOR GRANTING THE WRIT

I.

THE SUBJECTIVE BELIEFS OF AN INDIVIDUAL CONTACTED BY THE POLICE HAVE NO BEARING ON WHETHER THAT INDIVIDUAL WAS SEIZED WITHIN THE MEANING OF THE FOURTH AMENDMENT OR WHETHER HIS STATEMENTS WERE THE FRUIT OF ANY POLICE MISCONDUCT.

First, certiorari should be granted as this case raises an important question whether the subjective beliefs of an individual seized by law enforcement can render contact with law enforcement a seizure within the meaning of the Fourth Amendment.

Respondent's statements were suppressed on Fourth Amendment grounds as the California Supreme Court concluded the statements were obtained as a fruit of an unlawful seizure. However, as the dissent points out, the holding was not based on whether respondent had been seized for Fourth Amendment purposes in an objective sense, but was based on an evaluation of

respondent's state of mind during interrogation as he countered police questions rather than the objective facts. (*People v. Boyer, supra*, 48 Cal.3d at pp. 280-281 [Panelli J., dissenting]; Appen. pp. A-81-A-90.)

This case, thus, raises an important question as this Court has never expressly considered whether the subjective beliefs of a person contacted by the police may turn that contact into a seizure under the Fourth Amendment. Indeed, decisions of this Court on closely related facts have indicated the subjective beliefs of the person contacted have no bearing on whether a police contact is a seizure. Rather, the facts must be analyzed in an objective sense. Thus, the conclusion reached by the California Supreme Court here was erroneous.

In *Scott v. United States* (1978) 436 U.S. 128, 137-138, it was observed that

the fact the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for his action does not invalidate that action as long as the circumstances, viewed objectively, justify that action. (*Scott v. United States, supra*, 436 U.S. at p. 138.)

More recently, in *Brower v. County of Inyo* (1989) ___ U.S. ___, 103 L.Ed.2d 628, a case involving a lawsuit under 42 U.S.C. 1983, petitioners claimed respondents violated *Brower's* Fourth Amendment rights by using excessive force. This occurred when police set up a road block which resulted in *Brower* having a fatal collision. This Court concluded there was a seizure within the meaning of the Fourth Amendment, but concluded the intent or state of mind of the police was not an issue in determining whether there was a

seizure. (*Brower v. County of Inyo, supra*, ___ U.S. ___, 103 L.Ed.2d at p. 636.) Moreover, Justice Stevens, concurring, noted the lead opinion comported with the recent trend in cases of this Court indicating whether there was a seizure does not turn on the subjective intent of the officer. (*Id.*, at p. 638 [Stevens J., concurring].)

On May 15, 1989, this Court decided *Graham v. Connor* (1989) ___ U.S. ___, 57 U.S.L.W. 4513 (87-6571), which further supports this proposition. In *Graham* it was noted that:

"As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. (See, *Scott v. United States*, 436 U.S. 128,137-139 (1978); see also, *Terry v. Ohio, supra*, at 21 (in analyzing the reasonableness of a particular search or seizure, "it is imperative that the facts be judged against an objective standard.")."

It is true that this Court has observed that a person is seized when there is an official show of authority such that a reasonable person would have believed that he was not free to leave. (*Florida v. Royer* (1983) 460 U.S. 491, 501-502; *United States v. Mendenhall* (1980) 446 U.S. 544, 554-555 [Stewart J., concurring]; see too, *Florida v. Rodriguez* (1984) 465 U.S. 1, 5-6; *INS v. Delgado* (1984) 46 U.S. 210, 215-216). However, this does not connote a subjective standard is to be applied. Rather, it has been observed that use of the reasonable man standard by this Court was not designed so the question of whether a defendant had been unlawfully seized could hinge on the defendant's state of mind. Rather, it was to hinge on objective indices that would permit a fair determination of whether a seizure had

occurred. (See e.g., *United States v. Burrell* (D.C. App. 1972) 286 A.2d 845; La Fave, *Search and Seizure* [2nd. Ed. 1987], section 5.1(a), pp. 388-389.

As LaFave observes:

"Secondly, the question is not how the particular suspect subjectively perceived the situation, for the test is stated in objective 'reasonable man' terms. Of course, a given set of circumstances might operate quite differently upon a person with a 'guilty mind' as compared to an 'innocent person.' That being so, perhaps the seizure standard could be more accurately stated, as some lower courts have done, in terms of a 'reasonable person, innocent of any crime.' But, in any event, it is of great practical significance that the constitutional test for determining whether a seizure occurred is expressed in objective rather than subjective terms. Were it otherwise, the issue would 'be determined by swearing contests in which officers regularly maintain their lack of intention to assert power over a suspect save when the circumstances would make such claim absurd, and defendants would assert with equal regularity that they considered themselves to be significantly deprived of their liberty the minute officers began to inquire of them.'" (Emphasis in original.)

Similarly, Justice White in his dissenting opinion in *United States v. Mendenhall, supra*, 446 U.S. at page 570, notes that:

"Moreover, although Mr. Justice Stewart's opinion purports to make its 'seizure' finding turn on objective factors known to the person accosted, in distinguishing prior decisions holding that investigatory stops constitute 'seizures,' it does not rely on differences in the extent to which persons accosted could reasonably believe that they were free to leave." (Footnote omitted; emphasis added.)

Thus, this case presents an important vehicle for this Court to clarify that the subjective beliefs of the individual contacted by the police have no place in the Fourth Amendment analysis of whether a seizure has occurred.

Application of an objective test here reveals the respondent was not seized and his statements were not the fruit of any unlawful seizure.

First, as the trial court found, the manner and circumstances of respondent's

transportation to the police station confirm the police relied on his consent to transport him to the station for questioning. The facts show respondent was initially approached by plainclothes officers in unmarked cars. Respondent requested and was given permission to take his girlfriend with him to the station. She did not go with respondent, but was told he would be gone about three hours, which included two hours travel time. Moreover, he was alone in the backseat when transported and was not handcuffed or otherwise overtly restrained. The doors of the vehicle were unlocked during transport. He was also placed in a room used for custodial as well as non-custodial interrogation.

Moreover, while the interrogation was somewhat accusatory, there is no evidence respondent remained in the room involuntarily or involuntarily continued

to respond to the interrogation. Moreover, when respondent stated he wanted an attorney and wanted to terminate the interview, it stopped. (See, *People v. Boyer, supra*, 48 Cal.3d at pp. 280-283 [Panelli J, dissenting]; Appen. pp. A-81-A-90.)

Moreover, as Justice Panelli points out in his dissent, respondent had prior experience with law enforcement officials in several incidents of arrest or detention. "Whatever he may have feared concerning his status during the interrogation, he could not have reasonably believed, in the period following the cessation of the interrogation, that he was being, or would be detained." (*People v. Boyer, supra*, at p. 283.; Appen. A-88-A-89.))

Thus, had the California Supreme Court applied the objective, rather than subjective standard, as mandated by

decisions of this Court and not examined the contact between respondent and the police in terms of respondent's state of mind, it would have found there was no seizure here contrary to the Fourth Amendment.

Indeed, application of the subjective test carried over to the court's analysis of whether respondent's statements were the fruit of unlawful police conduct. Had the court applied an objective standard it would also have concluded his statements were not the fruit of unlawful police conduct.

Statements obtained after an unlawful seizure need not be suppressed where there are intervening events that break the casual connection between an illegal seizure and the statements so the statements are sufficiently an act of free

will to purge the primary taint. (*Taylor v. Alabama* (1982) 457 U.S. 687, 690; *Brown v. Illinois* (1975) 422 U.S. 590.)

As noted, respondent had prior dealings with the police. Moreover, after questioning had ceased, he consented to a search of the El Monte residence. He was asked for and agreed to have fingerprints taken for elimination purposes. Moreover, there was a break of 25 minutes between questioning and his statements while he was taken to the jail, fingerprinted, and returned to the jail. Thereafter, he was advised he could not be questioned further. Lewis also made statements indicating respondent was not the sole focus of the investigation and suggesting he was about to be released. At this point, as the officer was about to leave, respondent blurted out his incriminating statements. (*People v. Boyer, supra*, 48 Cal.3d at p. 283; Appen. pp. A-35-A-36.)

All these facts point to the unmistakable conclusion respondent's statements were not the fruit of incessant police investigation, but were volunteered statements that were not the fruit of any prior illegal action.

Application of an objective standard instead of an analysis of the subjective state of mind of respondent would have reached this conclusion as well. Thus, certiorari should be granted to clarify that the subjective state of mind of the suspect does not furnish a basis for Fourth Amendment analysis.

II

CERTIORARI SHOULD BE GRANTED TO CLARIFY THE SCOPE OF THE DECISION OF THIS COURT IN *EDWARDS V. ARIZONA* (1981) 451 U.S. 477, CONCERNING WHEN A SUSPECT INITIATES A CONVERSATION AFTER INVOKING HIS *MIRANDA* RIGHTS.

Certiorari should also be granted to clarify the scope of the decision of this Court in *Edwards v. Arizona*, *supra*, 451 U.S. 477, as to what constitutes initiation of a conversation with police after an individual has invoked his *Miranda* rights.

In *Edwards v. Arizona*, *supra*, 451 U.S. 477, the defendant voluntarily submitted to questioning and later stated he wished an attorney before the discussions continued. The following day the detectives confronted the defendant in the county jail, and when he refused to speak, he was told that he had to talk. This Court concluded the statements had to be suppressed. Once an accused has

invoked his right to counsel, he is not subject to further interrogation by the authorities until counsel is made available unless he initiates further communication, exchanges, or conversation with the police. Thus, *Edwards* precludes police from attempting to interrogate a suspect once he has invoked his right to counsel. An accused's statement after an invocation is only admissible if he initiates the conversation with the police. (Accord, *Arizona v. Robertson* (1988) ___ U.S. ___, 100 L.Ed. 2d 704, 717.)

The California Supreme Court, however, defined the term initiates in a very narrow manner and, relying on *Edwards* and its progeny, suppressed respondent's statements although they were volunteered.

Thus, certiorari should be granted to clarify what the scope of an initiated conversation is under *Edwards*.

The case of *Oregon v. Bradshaw*, *supra*, 462 U.S. 1039, is of prime importance for defining what the term initiates means. There the defendant was questioned and invoked his right to counsel. Thereafter, the defendant asked what was going to happen to him, the officer indicated the defendant did not have to speak to him and the defendant indicated he understood. After further discussion, the defendant agreed to a polygraph which he took after another reading of his *Miranda* rights. When the examiner indicated he did not believe the defendant, the defendant made several incriminating admissions.

A plurality of this Court noted that when the defendant asked what would happen to him next, he initiated a conversation with the police. The only remaining question then was whether, in light of all the circumstances, he thereafter made a

knowing and intelligent waiver of his right to counsel.

The lead opinion in *Bradshaw* was written by Justice Rehnquist and joined in by then Chief Justice Burger, and Justices White and O'Connor. Thus, it was only a plurality opinion. Justice Powell in a separate opinion concurred only in the result. (*Oregon v. Bradshaw*, *supra*, 472 U.S. at 1047.)

Justice Powell in his concurring opinion pointed out there was a disagreement in the court as to whether *Edwards* announced a new per se rule. He hoped, however, that *Bradshaw* would resolve the question. Unfortunately, he lamented, it did not do so as evidenced by the different readings of *Edwards* by Justice Rehnquist and Justice Marshall in his dissent which was joined in by

Justices Blackmun, Brennan, and Stevens. (*Oregon v. Bradshaw*, *supra*, at pp. 1048-1049.)

Although some of the questions left open in *Bradshaw* were resolved in *Solem v. Stumes* (1984) 465 U.S. 638, the question of what constitutes initiation of conversation by an individual after an invocation of *Miranda* rights still has not been clarified. (See e.g., *Solem v. Stumes*, *supra*, [Powell J., concurring] at p. 652 fn. 1; *Michigan v. Jackson* (1986) 475 U.S. 625, 638 [Rehnquist J., dissenting].)

The instant case thus gives this Court a prime vehicle for resolving the scope of initiated conversation under *Edwards*.

The record here shows respondent had been fingerprinted for elimination purposes after he had invoked his rights. He was expressly told by Lewis that since

he had invoked his rights, Lewis was not going to speak with him any further and was not going to solicit any statements from him. Lewis then gave respondent some information about the case, told him he would be checking further, and began to leave to arrange transportation for respondent. Respondent had made no incriminating statements up to that point, but then suddenly said, "Hey, wait a minute. Come back here and sit down. You are right. I can't live with it. I did it. I didn't mean to do it, but I did it." (*People v.Boyer*, *supra*, 48 Cal.3d at p. 207; Appen. p. A-36.)

It is clear these statements were volunteered and not the fruit of direct interrogation as in *Edwards*. Thus, nothing in *Edwards* indicates these statements are inadmissible.

Moreover, under the opinion of Justice Rehnquist in *Bradshaw* the comments

of respondent clearly evidenced willingness for a generalized discussion about the investigation. (*Oregon v. Bradshaw, supra*, 462 U.S. at pp. 1045-1046, 1048 [Powell J., concurring]). Indeed, the comments here clearly constitute an attempt to initiate a conversation even under Justice Marshall's narrower view of initiation in *Bradshaw* which is a desire to communicate about the subject matter of the investigation. (*Id.*, at 1048 [Powell J., concurring].)

Thus, certiorari should be granted in this case to clarify the scope of an initiated conversation as discussed in *Bradshaw*. Indeed, clarification is needed as evidenced by the fact the California Supreme Court declined to find respondent initiated a conversation after invoking his rights although it is clear even under Justice Marshall's discussion in *Bradshaw*

that respondent had initiated a conversation.

Bradshaw should thus be clarified so that volunteered statements as in this case after an invocation are not rendered inadmissible.

Indeed, it is clear respondent was the one who initiated further questioning by blurting out the remarks. Moreover, Lewis was not questioning respondent at that point and nothing indicates he was trying to elicit statements from respondent. Rather, he was about to let respondent go and was simply informing respondent of the state of the investigation.

The *Bradshaw* opinion does require a showing respondent waived his right to counsel at this point. The record here shows respondent was fully advised of his *Miranda* rights, expressed a desire to waive them despite his earlier invocation,

and then freely and voluntarily spoke with the police. Thus, his statements were clearly admissible under *Edwards* and *Bradshaw*.

The California Supreme Court, relying on *Rhode Island v. Innis* (1980) 446 U.S. 291, also concluded Lewis' conduct was tantamount to an interrogation and thus respondent's admissions were not admissible under the *Edwards* rule. (*People v. Boyer, supra*, 48 Cal.3d at p. 275.)

However, *Edwards* does not apply to implied interrogation, but to express interrogation. Moreover, under *Bradshaw*, since respondent initiated the further questioning by his outburst, the issue was whether his subsequent *Miranda* waiver was voluntary.

Moreover, even if *Rhode Island v. Innis, supra*, is applicable to this situation, there is no evidence

that Lewis' conduct was designed to elicit statements from respondent.

As Justice Panelli noted in his dissent, after respondent invoked his rights, no questioning took place over the next 30 minutes, respondent was told he could not be questioned further, and was told he was no longer the sole focus of the investigation. As the officer turned to leave the room, respondent called him back and blurted out the incriminating statement concerning his involvement in the killings. (See, *People v. Boyer, supra*, 48 Cal.3d at p. 282; Appen. pp. A-86-A-87.)

Thus, it is clear this case presents a prime example of initiated conversation under the rule announced in *Edwards* and *Bradshaw*. Certiorari thus should be granted to clarify the scope of initiated conversation as discussed in *Edwards* and *Bradshaw*.

CONCLUSION

Therefore, the petition for writ of certiorari should be granted to consider the important issues raised by this case.

DATED: June 26, 1989.

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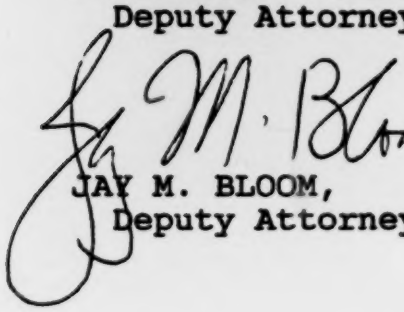

JAY M. BLOOM,
Deputy Attorney General

JMB:bjr
89US0003

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. _____

State of California (Petitioner or Appellant) vs. Richard Delmer Boyer (Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for ~~People of the State of California (Dept. of Justice/Office of the Attorney General)~~
(Please list names of all parties represented)

who IN THIS COURT is ☒ Petitioner(s) ☐ Respondent(s) ☐ Amicus Curiae ☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature Jay M. Bloom

(Type or print) Name Jay M. Bloom

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm CA Dept. of Justice/Office of the Attorney General

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ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO-73A

AFFIDAVIT OF SERVICE BY MAIL

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110 West A Street, Suite 700
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No:
October Term, 1988

PEOPLE OF THE STATE OF CALIFORNIA
Petitioner,

RICHARD DELMER BOYER

v.

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within Petition for Writ of Certiorari as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

California Supreme Court
Robert Wandruff, Clerk
350 McAllister Street, Room 4250
San Francisco, California 94102

Barbara Caulfield, Attorney
Brobeck, Phleger & Harrison
One Market Plaza, Spear Street Tower
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Ed Freeman, Deputy District Attorney
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Santa Ana, CA 92701

Gary Granville, Clerk
Orange Co. Superior Court
For: Hon. James Turner
700 Civic Ctr. Dr., W.
Santa Ana, CA 92701

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 10 day of July, 1989.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, July 10, 1989.

Barbara Renfrow
BARBARA RENFROW

Subscribed and sworn to before me
this 10th day of July, 1989.

JEAN M. BURNS
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Sept. 17, 1991

Jean M. Burns
Notary Public in and for said County and State

(2) 89-40

No. _____

Supreme Court, U.S.
FILED
JUL 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner and Respondent,

v.

RICHARD DELMER BOYER,

Defendant and Appellant.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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APPENDIX A

APPENDIX A

[Filed March 13, 1989]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	S004656
Plaintiff and Respondent	)	Crim No. 24265
v.	)	S.C. No. C-24265
RICHARD DELMER BOYER,	)	
Defendant and Appellant.	)	

Defendant Richard Delmer Boyer was convicted in Orange County Superior Court of two counts of first degree murder (Pen. Code, §§ 187, 189 [1]) and two counts of robbery (§211). The jury sustained an allegation that defendant had used a deadly weapon, a knife, in each of the offenses (§ 12022, subd. (b)). It also

SEE DISSENTING OPINION

1. All statutory references are to the Penal Code unless otherwise indicated.

found as special circumstances under the 1978 death penalty statute that defendant had been convicted of more than one murder in the proceeding (§ 190.2, subd. (a)(3)) and that each of the murders was committed intentionally in the course of a robbery (§ 190.2, subd. (a)(17)(i).) After a penalty trial, a jury imposed a death sentence. The trial judge sustained the penalty verdict (§ 190.4, subd. (e)), and a judgment of death was entered. This appeal is automatic.

We confront the relatively rare but distressing case in which the outcome is determined by the constable's blunders. Defendant's inculpatory statement to the police was obtained in flagrant violation of the Fourth Amendment and Miranda v. Arizona (1966) 384 U.S. 436. The courts below should therefore have granted defendant's motions to suppress the statement. Its admission at his guilt

trial was prejudicial by any applicable standard. We must therefore reverse the judgment in its entirety.

However, we reject defendant's contention that other material evidence of his guilt was also suppressible as "tainted fruit" of the illegal police conduct. This remaining evidence, we conclude, may be admitted in any retrial.

I. GUILT TRIAL

A. Prosecution case-in-chief.

On the evening of December 7, 1982, Francis and Eileen Harbitz, an elderly Fullerton couple, were robbed and stabbed to death in their home. There were no signs of forced entry. The bodies were discovered several days later by the victims' son William, who had become concerned for his parents because they had not responded to his calls and had not been seen.

William testified he knew defendant,

who was also acquainted with the victims. On several occasions, defendant helped the elder Harbitzes around the house, and he owed them money. Defendant had been at the senior Harbitzes' home about four months before the killings, and William had not seen or heard from him for a long while thereafter. However, in the week before December 7, William received several telephone calls from defendant. In once conversation, defendant indicated he was struggling to survive financially.

Under a grant of immunity, John Kennedy testified that he and defendant purchased and injected cocaine together on the afternoon of December 7. Kennedy used $25 of his own money to buy the drug. After consuming the cocaine, the two men went to the home of defendant's parents, where defendant was to get money to pay Kennedy back. When he emerged from his parents' residence, defendant claimed he

had the money, but he did not immediately give it to Kennedy.

Defendant later indicated he wanted to go to the residence of someone named Bill to collect some money Bill owed him. Kennedy drove defendant to a neighborhood in Fullerton. At defendant's direction, Kennedy parked on a side street, then waited while defendant crossed a yard and disappeared. Defendant was wearing a knife in a sheath. After 45 or 50 minutes, defendant returned carrying a towel. At that moment, a police or security car passed by, and defendant used the towel to wipe off the rear window of Kennedy's vehicle.

Defendant then got into Kennedy's car and told him to drive off calmly without attracting attention. Kennedy noticed a spot of blood on defendant's knife. While they were driving, defendant disclosed he had been stabbed in the leg, and he put

the towel over his left knee. Defendant said there had been dope dealers in the house who had no dope and wanted to hurt him, but he had hurt them instead. At defendant's direction, Kennedy proceeded back toward defendant's El Monte residence, using the "605" and San Bernardino freeways. During the trip, defendant went through two wallets. He threw one out the window along the San Bernardino freeway and discarded the other in a sewer ditch beside an offramp in Temple City. Defendant eventually repaid Kennedy for the cocaine.

Cindy Cornwell, also granted immunity for her testimony, disclosed that she and her three children lived with defendant from October 1982 until his arrest. The sole household income was Cornwell's welfare check, and they were in severe economic straits. Cornwell knew defendant had no money on December 7, 1982, because

he asked her for $30 that morning. Later that day, he left with Kennedy, saying he wanted to sell a shotgun to his parents to get cash and would be "right back."

Defendant returned home in the evening with a stab wound near his left knee. He said he had been unable to sell the gun to his parents, and had been knifed in an argument with a loan shark whom he next approached. Defendant told Cornwell he had ultimately obtained $10 for the shotgun. He displayed the money, which consisted of two separate bundles of five $1 bills.

On the evening of December 14, defendant told Cornwell he had done something which would make her "mad at him" but gave no further details. Shortly thereafter, Fullerton detectives arrived and asked defendant to accompany them to the station for an interview. Later that evening, after consulting defendant and

her attorney, Cornwell gave the police permission to search the residence. Before the police arrived to search, Cornwell burned the light blue jacket defendant had worn on December 7. Cornwell said her motive was to distract defendant when he returned from the police station by telling him she had burned the jacket but was buying him a new one for Christmas.

Cornwell had seen defendant drunk "many times"; by early December 1982 she was aware he smoked marijuana and used cocaine daily. However, defendant seemed sober when he returned on the night of December 7. Cornwell also indicated that defendant habitually wore a knife on his belt, but had stopped doing so after that day.

During the December 14 search of the home shared by defendant and Cornwell, police found pants stained with blood

similar to that of the victims. A bloodstained knife was also seized from the residence. The stains on the knife were of human origin, but were too small to allow closer analysis.

While at the Fullerton police station on December 14, defendant admitted killing the Harbitzes. His recorded interview with Detective Lewis was played for the jury. During the interview, defendant said he had been drinking on December 7 and "was on cola that night, cocaine." He went to his parents to obtain money, but was unsuccessful. He next tried to find William Harbitz for the same purpose, but William had moved from the last address defendant knew. Defendant shared a PCP cigarette with his friend Melody. He then proceeded to the senior Harbitzes' residence, driving a car borrowed from

Kennedy.[2] His purpose was to find out where William lived. When he arrived, he "had bennies in [him]" as well as "cocaine . . . and PCP;" he "was definitely on the stuff."

According to defendant's statement, Mrs. Harbitz admitted him cordially. They chatted briefly in the kitchen. Defendant was beginning to feel faint. Mrs. Harbitz encouraged him to say hello to her husband, who was watching television in the bedroom. Defendant did so. While in the bedroom, he noticed Mr. Harbitz's wallet on the dresser. He began to form a "crazy idea" to rob the Harbitzes or obtain money from them somehow.

He emerged from the bedroom, feeling more and more dizzy, and encountered Mrs. Harbitz. As he followed her back down the

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2. In his recorded statement, defendant denied that Kennedy was with him when he went to the Harbitz residence.

hall toward the kitchen, he decided to take the couple's wallets and money. At that time, he did not intend to harm them. However, as he placed his hand over Mrs. Harbitz's mouth, he "freaked out" and began to stab her again and again. She broke free and screamed for her husband. Mr. Harbitz came into the hallway and began hitting defendant with his cane. Defendant then "tore into" Mr. Harbitz with the knife. Sometime during the attacks, defendant stabbed himself in the leg but did not realize it at the time.

After the assaults, defendant recounted, he retrieved Mr. Harbitz's wallet from the bedroom dresser.[3/] He then rinsed off the knife in the kitchen sink. Mrs. Harbitz's purse was in the kitchen, and he removed her wallet. He took a

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3. In responde to questioning, defendant made clear that the wallet was on the dresser, not in Mr. Harbitz's trousers.

towel for his leg, left by the front door, and drove away. He removed the cash from the wallets--about $40 in all--and threw them out of the car along the "605" freeway. He also threw the towel away. However, defendant indicated that his bloody jacket, trousers, and knife were still in the house he shared with Cornwell.

Defendant said that just before he grabbed Mrs. Harbitz, he developed a severe headache; then he "started just freakin' out." He was "seeing colors," "flashes" went through his head, and the room "started spinnin'." When Mrs. Harbitz struggled, defendant drew his knife; as he did, he remembered thinking, "I get too involved in, in, violent movies. Okay? And I was thinking of something into that nature at the time. I don't know if I was puttin' myself in, in

one of the actor's spots or something. . . ." He remembered only "pieces" of the episode and could not recall where or how many times he had stabbed the victims. He expressed remorse for the killings.

Later on the evening of December 14, after the interview had ended, defendant led detectives to a sewer gutter next to the Temple City offramp from the San Bernardino freeway. There they recovered a wallet linked to the victims.

B. Defense case.

Defendant testified in his own behalf as follows: He had been at the Harbitz's home many times, doing yard and house work. He felt affection for Mr. and Mrs. Harbitz, and he cared about them. He had borrowed money from the Harbitzes in the past, but they were not pressing him for repayment.

Defendant habitually used alcohol,

cocaine, marijuana, LSD, Quaaludes, "reds", and "angel dust" (PCP). He consumed a pint of whiskey during the day of December 7, 1982, and may have smoked some "pot." He and Kennedy also "scored" a quarter gram of cocaine, using Kennedy's money. While waiting for Kennedy to obtain the cocaine from Kennedy's "connection" in El Monte, defendant smoked a PCP cigarette. As Kennedy had testified, the two injected the cocaine, then began an odyssey in search of money to repay Kennedy.

During this interval, defendant began to develop a headache he recognized as a reaction to the drugs. He knew from experience that he was "in trouble" and that the symptoms would worsen. His paranoia increased, and his vision began to "play games" with him.

Finally defendant and Kennedy arrived in the senior Harbitzes' neighborhood.

Defendant intended to ask William Harbitz's parents where William was now living. Defendant had no intent to harm the elder Harbitzes or obtain money from them. He told Kennedy to drop him off around the corner from the Harbitz residence because his head hurt, Kennedy's "complaining" was making him "paranoid," and he just wanted to get out of the car. After defendant entered the house, his headache intensified, and he felt like someone was hitting him in the back of the head with a hard object. He chatted with Mrs. Harbitz in the kitchen and briefly visited Mr. Harbitz in the bedroom, feeling worse as the minutes passed and wanting only to be on his way.

Defendant politely ended his conversation with Mr. Harbitz, then began to follow Mrs. Harbitz back down the hall toward the front room. As he did so, he say a foggy figure which looked like a

killer in a horror movie, either "Friday the 13th" or "Halloween." He could not make the vision disappear. Defendant felt like he was on a "bad trip" induced by the drugs he had ingested.

At this point, everything "went black." Defendant next recalled kneeling beside Mrs. Harbitz, who was lying on the floor surrounded by blood. Defendant saw Mr. Harbitz and told him to get help. When Mr. Harbitz did not respond, defendant wondered if he was also hurt and went toward him. Defendant again remembered nothing until he found himself in the bathroom, holding a towel and noticing blood on his leg. He blacked out again until he arrived at his car. Contrary to his taped statement, he did not remember taking wallets from the house.

Defendant recalled wiping off the car's rear window with the towel when a

police vehicle passed by, but "wasn't really sure" what he needed to conceal. Anxious that "something" had happened inside the house, he told Kennedy to drive away slowly. Defendant then noticed Mr. Harbitz's wallet in his pocket and took the money it contained. He initially intended to throw the wallet out of the car along the freeway, but he ultimately left it in a drainage ditch across the street from his house.

Defendant lied to both Kennedy and Cornwell about the events of the evening of December 7 because he did not know what to say and did not want questions. During the next week, he telephoned both William Harbitz and the senior Harbitzes' residence several times, hoping to learn whether something had happened to them. By the evening of December 14, when Fullerton detectives arrived, defendant was convinced he had probably done

something "terrible"; he told Cornwell he thought he had "hurt a couple of people."[4] However, in the taped interview with Detective Lewis, defendant "filled in gaps in his memory," saying he remembered things he actually did not recall. Defendant did so to protect Kennedy and Cornwell. Contrary to his interview statement, he never consciously decided to rob the Harbitzes or obtain money from

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4. This testimony differs both from defendant's police interview and from Cornwells' trial testimony. Defendant and Cornwell have consistently stated that they had a brief, interrupted discussion just before the Fullerton detectives arrived at defendant's El Monte home on December 14. Cornwell claimed at trial that defendant said he had done something she would be "mad" about, but that he gave no further details. Cornwell said she assumed at the time that the transgression was minor. In his statement to the police, on the other hand, defendant declared that he "told her who it was" he had "murdered" and confessed he had "killed . . . Bill's parents." According to defendant's interview statement, his admission to Cornwell "just like took the breath away from her . . . ."

them, and he had no memory of the stabbings.

The defense also called Dr. Ronald Siegel, a psychopharmacologist. Siegel recited his understanding of defendant's heavy use since adolescence of multiple drugs. According to Siegel, certain of these drugs, particularly LSD, can induce later spontaneous and involuntary "flashbacks," in which the subject relives a prior drug experience. Siegel testified that in a minority of cases--about 7 percent--the subject cannot distinguish the flashback from reality.

Siegel said he had ascertained from defendant's description that defendant's hallucinations in the Harbitz residence were from the movie "Halloween II," which defendant had seen under the influence of PCP, marijuana, and alcohol. The film was played for the jury, and Siegel pointed out various similarities between its

scenes and the visions defendant described.

According to Siegel, defendant's report of his feelings at the time of the killings was "consistent with" a momentary flashback to the movie. If such an episode occurred, Siegel suggested, it would have produced confusion, anxiety, impulsiveness, and panic. These feelings would be intensified by the PCP and cocaine defendant had ingested on December 7, 1982, and "may" have caused him to overreact.

Siegel acknowledged that any such flashback was brief, since defendant's conduct beginning immediately after the killings showed rational attempts to conceal his guilt. Thus, Siegel conceded, "I don't think [defendant's] intoxication was that intense . . . ."

C Prosecution rebuttal.

On rebuttal the prosecution

introduced a stipulated statement to the following effect: On December 15, 1982, the day after the taped statement, Fullerton Detectives Allred and Lewis again interviewed defendant. At that time, defendant said he remembered stabbing Mr. and Mrs. Harbitz more than once, but he could not say how many times. Defendant also admitted knowing before he left the Harbitzes' home that he had killed them, and he again expressed remorse.

II. SUPPRESSION OF EVIDENCE

At his preliminary hearing, and before both guilt trials in this case,[5] defendant sought suppression of his statement of December 14, 1982, and of other evidence stemming from his station house interview, on grounds they were obtained in violation of his rights under

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5. A previous guilt trial resulted in a hung jury.

the Fourth and Fifth Amendments and Miranda v. Arizona, supra, 384 U.S. 436. His motions were denied at all stages. Defendant renews contentions that he was denied his Miranda rights, that his statement was involuntary because induced by promises and threats, and that it was the product of an illegal seizure without legal cause.

We find defendant's Fourth Amendment and Miranda claims persuasive. The police misconduct leading to defendant's inculpatory statement was aggravated. Though the People characterize his participation as "voluntary," defendant was transported from his El Monte home to the Fullerton police station and interrogated under circumstances amounting to an arrest. This detention was improper under the Fourth Amendment because, as the People concede, the police had no legal ground for the restraint. Defendant's

statement was the direct product of the illegal seizure.

Moreover, the interrogating detectives pointedly ignored defendant's unequivocal attempts to assert his Miranda rights to silence and counsel. After questioning finally ceased, and without honoring defendant's request for an attorney, one of the detectives began a new conversation about the case under circumstances reasonably calculated to elicit an incriminating response. The ploy was successful; defendant blurted an admission that he was the killer. For each of these reasons independently, defendant's statement was inadmissible at trial as proof of his guilt.

The scope of our review of constitutional claims of this nature is well established. We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of

credibility, if they are substantially supported. (See, e.g., People v. Howard (1988) 44 Cal.3d 375, 398; In re Erick J. (1979) 25 Cal.3d 522, 527; People v. James (1977) 19 Cal.3d 99, 107.) However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained. (See, e.g., People v. Jimenez (1978) 21 Cal.3d 595, 609.) Applying these standards, we address the circumstances surrounding defendant's statement.

A. Circumstances of interrogation.

The record, viewed most favorably to the prosecution, indicates as follows: By December 14, 1982, Fullerton police deemed defendant a possible suspect in the Harbitz killings, but they lacked

sufficient cause to arrest him.[6/] About 5:30 p.m. on December 14, after evening darkness had set in, Detectives Allred and Lewis met at defendant's El Monte residence with Officers Scroggins and Fentress of the El Monte police force. Both sets of officers were in plainclothes and unmarked vehicles. Lewis explained to Scroggins and Fentress that he lacked probable cause to arrest petitioner and was seeking a voluntary interview. He instructed them to "cover the rear" of the house while he and Allred knocked at the front door. It was understood that

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6. Fullerton Detectives Allred and Lewis acknowledged as much in their testimony at the suppression hearings. Their concession appears well-founded. As of December 14, police suspicions rested principally on the "long shot" suggestion of William Harbitz (himself initially a suspect) that defendant might be the killer because he had done gardening work for the elder Harbitzes, owed them money, often carried a sheath knife, was violent when drunk, and had suddenly begun calling William after being out of touch for several months.

defendant would be detained if he attempted to flee.

Lewis knocked on the door, identified himself to a woman who peered out the window, asked for defendant, and requested permission to enter. The woman explained the front door could not be opened. Defendant then emerged from the back door and was stopped by Scroggins and Fentress. Scroggins identified himself as a police officer, asked defendant to step into the driveway, and told him two gentlemen in front would like to speak to him. Lewis and defendant testified that the El Monte officers commanded defendant to "freeze"

or "halt" when he came out the door.[7]

The evidence was conflicting as to whether the El Monte officers had "ahold" of defendant as they walked him to the front of the house. There Lewis asked defendant if he would voluntarily come to the Fullerton police station for an interview. Defendant agreed. He testified he did so because he thought he would have to go anyway and did not want to create a scene in front of Cornwell.

Defendant asked if he could go in and get a shirt before leaving with the officers. Lewis agreed, and the officers followed defendant inside. Lewis went

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7. Defendant testified he had heard noises that sounded like dogs barking, went outside to investigate, saw flashlight beams he associated with police officers, and heard someone say "halt" and identify as a police officer. Lewis said he heard someone behind the house say, "police officers, freeze." Defendant then came around the corner of the house walking in front of Scroggins and Fentress.

into the house because he wanted to keep defendant in sight.[8/]

Inside the house, Cindy Cornwell asked if she could accompany defendant to the station. Lewis said she could go, but she was unable to arrange child care. Lewis explained that defendant would be gone about three hours, including one hour of interview time and two hours of travel.

Defendant and the officers then emerged from the house and walked to the Fullerton police car, where defendant was frisked for weapons. Lewis told defendant to "have a seat in back," and defendant did so. Lewis and Allred got into the front seat. There was no cage between the front and rear of the passenger compartment, defendant was not handcuffed, and the car doors were not locked. During

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8. Whether defendant expressly consented to the officers' entry is disputed.

the one-hour drive from El Monte to Fullerton, Lewis told defendant they were investigating a homicide and would not take statements until they reached the station.

Once at the Fullerton station, Lewis and Allred brought defendant to a small interrogation room. About 7:15 p.m., Lewis advised defendant ofhis Miranda rights and commenced a tape recorded interview.[9/] Defendant testified he was not aware the conversation was being recorded.

Lewis told defendant the police were

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9. In obtaining defendant's Miranda waiver at the outset, Lewis twice asked if defendant, with his rights in mind, was willing to talk to Lewis about the "charges" against him. After the first such question, defendant inquired what charges Lewis was talking about. Lewis then attempted to correct himself, saying "[t]here's, there's no charges at . . . ." Defendant responded, "Oh, okay," and agreed to talk. Lewis then re-asked the question, again using the words "charges against you."

investigating the murders of Mr. and Mrs. Harbitz. He then asked some general questions about defendant's relationship to the victims and how recently he had been at their home. Defendant insisted he had not been there for at least six months. After several minutes, Lewis told defendant that William Harbitz "says you killed his mother and dad." As defendant continued to protest his innocence, Lewis repeatedly proclaimed that the police knew and could prove defendant had committed the homicides, and that defendant was "gonna' fall on this one." Lewis declared that the authorities had evidence of which defendant was unaware, that they could "place [him] at the scene," and that he would discover the nature of the evidence "when [he went] to court." Defendant's lies to the contrary, Lewis asserted, would not make the situation "go away."

Lewis suggested that defendant

probably was "wired" (i.e., intoxicated by drugs) when he stabbed the victims and was not fully aware of what he had done. Defendant was urged to show some "damn conscience" and to help the police "understand" his actions. Again and again, Lewis insisted defendant would not be able to "live with" his guilt. Still defendant insisted he had not gone to the Harbitz residence on December 7 and was not the killer.

During this period, defendant asked several times if he was under arrest; Lewis evaded the questions and continued the interrogation. In hopes of prolonging the interview, Lewis also ignored several unequivocal statements by defendant that he wanted a lawyer and did not wish to say anything further. Finally, around 8:49 p.m., defendant again said he "[didn't] wanna talk no more." At this point, Lewis ended the questioning and

told defendant to "sit tight."[10/]

After leaving the room for a moment,

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10. After twice refusing to answer defendant's inquiry whether he was under arrest, Detective Lewis continued aggressive questioning, finally accusing defendant of "sittin' here lying to me. . . ." The conversation then proceeded as follows: "[¶] [DEFENDANT]: "So, am I under arrest? I'm under arrest. For murder. (inaudible) charges. [¶] LEWIS: That's where you're at right now. [¶] [DEFENDANT]: Can I have a phone call later? [¶] LEWIS: Uh-huh (yes) [¶] [DEFENDANT}: Well, if I'm under, I wanna lawyer-- [¶] LEWIS: I didn't think that a, [¶] [DEFENDANT]: If I'm under arrest, I wanna lawyer. [¶] . . . [¶] . . . I wanna lawyer now if I'm under arrest. [¶] LEWIS: What do you mean, if you're under arrest? You saying you don't want a lawyer if you're not under arrest? That's kinda word games, isn't it? [¶} [DEFENDANT]: Well I, in other words, I don't wanna say no more, you know. Those are my rights, aren't they? [¶] LEWIS: Sure." Nonetheless, Lewis continued the conversation, reemphasizing his theme that defendant would not be able to live with his guilt. Defendant again said, "I'm not sayin' no more. I'm sorry." Again he was ignored. Lewis asked if defendant's girlfriend knew "what you did," and he pursued a line of questioning, ostensibly sympathetic, about defendant's relations with his parents and with the victims. Finally, after an apparent break in the tape, defendant said again, "And I don't wanna talk no more." This time, his request was honored.

Lewis returned and asked defendant for consent to search the El Monte house. Lewis urged that defendant should have no objection if, as he insisted, he had nothing to hide. Defendant agreed to a search, but only if Cornwell also gave permission, since "[i]t's her house."

After obtaining defendant's consent to search, Lewis again told him to "sit tight for a few minutes" and turned off the recorder. Lewis then telephoned Fullerton Officers Davinroy and Ritter, who had been waiting at a fire station near the El Monte house. He told them they must obtain Cornwell's consent to search the residence. Before doing so, she consulted both defendant (see discussion, post) and her attorney. Cornwell subsequently signed a written consent form.

After calling Davinroy and Ritter, Lewis returned to the interrogation room.

With the tape recorder still off, Lewis asked defendant if the police could fingerprint him for elimination purposes. According to Lewis, defendant said "okay" but asked again if this meant he was under arrest; Lewis answered that he was not. Defendant recalled no such conversation. Allred then "walk[ed defendant] over to the jail facility" to have his fingerprints taken. Defendant testified he was handcuffed during the trip to the jail; the officers denied it.

After about 25 minutes, Allred returned from the jail with defendant. Defendant took a telephone call from Cornwell. As Lewis interpreted defendant's side of the conversation, Cornwell was asking whether she should give permission to search their residence. Defendant indicated "that it was her decision, it was her house, it was okay with him." Lewis overheard defendant tell

Cornwell he was being charged with two counts of murder. This "somewhat shocked" and "surprised" Lewis, since defendant had not been placed under arrest.

When defendant completed the telephone conversation, he walked toward Lewis, who was standing in the hallway adjacent to the interrogation room. As he did so, Lewis said, "Why don't you step in here [i.e., the interrogation room] for a few minutes, I just want to tell you a couple things." Defendant walked into the room and sat down, while Lewis remained standing at the doorway. The tape machine was not turned on. Lewis recited that since defendant had asked for an attorney, "I wasn't there to solicit any statements from him," but "I just wanted him to understand a couple things."

Lewis then told defendant that while he was being fingerprinted, the detectives had telephoned Paul Harbitz, another of

the victim's sons. Paul was "fairly certain" defendant had done yard work for the senior Harbitzes in September or October, more recently than defendant maintained. Lewis advised defendant that he "didn't know whether [defendant] was involved in this" and "whether he was telling the truth or not" but would be "checking further into the case with Bill Harbitz."

According to Lewis, he then turned to leave the room, intending to arrange transportation home for defendant. At this point, defendant shouted, "Hey, wait a minute. Come back here and sit down. You're right, I can't live with it. I did it. I didn't mean to do it. But I did it."

Lewis reactivated the recorder and took a waiver of defendant's Miranda rights, during which defendant remarked that he could not afford an attorney.

Defendant then proceeded to give the statement described above.

B. Illegal seizure.

Defendant first urges that his statement must be suppressed because it is the fruit of an illegal arrest without a warrant or probable cause. We agree.

Because of the particular interests protected by the Fourth Amendment, a statement must be suppressed, even when knowing, voluntary, and intelligent, if it is the direct product of an illegal arrest or detention. (Dunaway v. New York (1979) 442 U.S. 200, 216-217; Brown v. Illinois (1975) 422 U.S. 590, 602-604.) By proscribing searches and seizures without adequate cause or judicial authorization, the Fourth Amendment guards, among other things, against the police tactic of "investigative detention." (E.g., Hayes v. Florida (1985) 470 U.S. 811, 815-816.) This case presents a classic example of

such tactics.

The People urge that the encounter between defendant and the police was consensual, and thus not a detention. However, the test of detention under the Fourth Amendment is whether a reasonable person in the suspect's position would have felt free to leave. (E.g., Florida v. Royer (1983) 460 U.S. 491, 501-502.) Under this test, the instant facts suggest conclusively that defendant's interrogation occurred during an illegal, prolonged detention amounting to arrest.

The People stress that defendant was contacted by plainclothes officers in unmarked cars, agreed to go to the police station, was never handcuffed or overtly restrained, and was questioned in an interview room not exclusively reserved for suspects under arrest. They emphasize that the officers never told defendant he was under arrest and had no intent to

arrest him until he made the incriminating statement "I did it."

We agree with defendant, however, that many of the formal indicia of detention or arrest were present during the initial encounter with the officers, his transportation to the Fullerton station, and the ensuing interview. The manner in which the police arrived at defendant's home, accosted him, and secured his "consent" to accompany them suggested they did not intend to take "no" for an answer. Indeed, as previously noted, Lewis testified that the officers intended to detain defendant if he attempted to leave before speaking with them.

Whatever defendant's status before arriving at the Fullerton station, however, the situation quickly ripened into a full-blown arrest inside the station house. Defendant was confronted

by two officers in a small interrogation room. He was informed of his Miranda rights, an indication that the officers themselves believed the situation might be tantamount to custody. Thereafter, he was subjected to more than an hour of directly accusatory questioning, in which Lewis repeatedly told him--falsely--that the police knew he was the killer, had all the necessary evidence, intended to charge him with the crimes, and would prove his guilt in court. According to Lewis, they sought only to learn "why" he had done it, in order to establish the precise degree of culpability.

While Lewis never expressly told defendant he was under arrest, his response to defendant's pointed inquiries on that issue furthered the impression of official restraint. Lewis first ignored defendant's questions about arrest. Then, in what appeared an immediate answer to

another such question, Lewis said, "That's where you're at right now." (See fn. 10, ante.)[11/] When defendant then asked if he could have a telephone call "later"--an obvious indication that he believed himself in custody--Lewis simply responded, "Uh-huh." (Ibid.)

Under such circumstances, a reasonable person could only conclude that the police deemed him their sole suspect in a double murder and would restrain and formally arrest him if he tried to leave. Thus, defendant was under illegal arrest during this period. The question remains whether his final statement was obtained by exploitation of the illegality and must

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11. Lewis testified he intended this comment merely as a continuation of his prior statement to defendant that he believed defendant was lying about his innocence. In context, his remark was not likely to be understood in that way. Even if it were, however, it would constitute yet another ominous evasion of defendant's questions.

therefore be suppressed.

The issue is whether "intervening events break the causal connection between the illegal [detention] and the [incriminating statement] so that the [statement] is '"sufficiently an act of free will to purge the primary taint."' [Citations.]" (Taylor v. Alabama (1982) 457 U.S. 687, 690, quoting Brown, supra, 422 U.S. at p. 602, which in turn quotes Wong Sun v. United States (1963) 371 U.S. 471, 486.) The important considerations are "[t]he temporal proximity of the [illegal seizure] and the [statement], the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct." (Taylor, supra, quoting Brown, supra, at pp. 603-604.)

The People suggest that defendant's statement was not the tainted "product" of the illegal arrest, since it occurred as a

spontaneous outburst, long after coercive questioning had ceased, and at a time when defendant cannot have believed his liberty was restrained. They emphasize that in the interim between interrogation and statement, defendant consented to "voluntary" fingerprinting, was told he was not under arrest, and was allowed to speak by telephone with his girlfriend. Moreover, the People note, Detective Lewis was preparing to arrange defendant's transportation home when defendant called him back with the words, "I did it."

No such "attenuation" argument was raised below. In any event, we are not persuaded. As the record makes clear, defendant's statement occurred less than four hours after he left this home under police escort, and less than two hours after the commencement of a station house interrogation in which aggressive "softening up" tactics were employed. He

remained in police facilities and police company up to the moment he decided to give his statement. Hence, there were no significant intervening events to break the chain of causation between the flagrant illegality of his custodial interrogation and his subsequent statement. (Compare, e.g., Dunaway, supra, 442 U.S. at pp. 218-219; Brown, supra, 422 U.S. at pp. 603-605.)

Were there any remaining doubt, it is resolved by defendant's own words when he first blurted out this involvement in the killings. Defendant's concession that "You're right, I can't live with it" was a direct and obvious response to the interrogational techniques used by Detective Lewis during the earlier illegal interview. Again and again, Lewis had exhorted defendant to confess because he would not be able to "live with" his

guilt.[12/] Defendant's "I did it" statement led immediately to his agreement to give a

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12. Lewis' variations on the "guilty conscience" theme included the following: "I don't think . . . you can live with it. I don't think you can keep it in your head now that you know what you've done." "You think you can ever face Bill [Harbitz] again? Or Glenda [William Harbitz's wife]?" ". . . And I know you're probably sorry as hell you did it, and you probably can't even believe at this time that you did do it. I think it's like a bad dream to you--you're just trying to wipe it out. but it's not gonna go away." ". . .What. . . I want you to face up to telling me why you did it." "I'll tell you what I think, Rich. I don't think you're gonna be able to live with it. I mean up here. I don't think you can take what you did, you know what I'm saying? Okay?" "Okay, now, listen, up here, is where I don't think you're gonna be able to handle what you did." "I just don't think that you can handle it, psychologically, what you did. Having killed those two people. I don't think you can live with that, Rich. And I think further down the road, you're probably gonna need some help. . . ." ". . . I've been tryin' to find . . . some damn conscience in ya, you know." "Don't you think when someone does something that, you know, especially if it's a, a situation that hurts uh, someone else . . . [t]hat they oughtta be penalized? Don't you believe that?" ". . . Tell me something Rich, you think you're gonna be able to live with it? "Up in your head?"

complete statement under a new Miranda waiver. We could hardly have clearer proof that defendant's entire statement was the product of a will overborne during an illegal detention. For this reason alone, the statement should have been suppressed.

C. Miranda.

Defendant asserts that his statement was also inadmissible for the additional reason that his Miranda rights were violated in several respects. We concur that defendant's statement was obtained in contravention of Miranda. For this

independent reason, it should have been excluded from his trial.[13/]

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13. In discussing defendant's Miranda arguments, we realize that some question arises whether his trial counsel took all necessary technical steps to save the point for review. As we have noted on several occasions, in limine trial court rulings on nonstatutory motions to exclude evidence are not binding, since a court must remain free to alter its ruling upon full information at trial. Hence, in general, "when an in limine ruling that evidence is admissible has been made, the party seeking exclusion must object at such time as the evidence is actually offered to preserve the issue for appeal. [Citations.] . . . ." (People v. Jennings (1988) 46 Cal.3d 963, 975, fn. 3.) Binding pretrial suppression rulings under section 1538.5 as an exception to these principles, but a section 1538.5 motion is limited to evidence obtained by illegal search or seizure; it does not extend to Miranda claims. (People v. Campa (1984) 36 Cal.3d 870, 885.)

Here, both the section 1538.5 motion and the nonstatutory Miranda motion were heard and decided in the superior court before the challenged evidence was offered at defendant's first trial. For the record, defendant renewed all suppression motions at the second trial. At the conclusion of jury selection at the second trial, but before evidence had been presented, the court ruled without objection that all suppression rulings from the first trial would remain in effect. Thereafter, defense counsel raised no Miranda challenge when the

(Footnote continued on next page.)

The prophylactic requirements of Miranda, supra, are familiar. In order to

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(Footnote continued from previous page.) prosecution offered the taped statement in evidence.

Nonetheless, we find the Miranda issue properly before us on the particular facts. Even if the parties' acceptance of the "continued effect" ruling did not amount to a "stipulation" on that point (see Jennings, supra, 46 Cal.3d at pp. 975-976, & fns. 3, 4), any renewed objection would have been entirely futile. The sole issue litigated in the binding pretrial emotion under section 1538.5 was whether defendant was being "detained" by the police for Fourth Amendment purposes at the time he made his statement. (The People conceded that the police had neither a warrant nor legal cause to detain him, and they did not argue that the statement was somehow "attenuated" from any illegal detention.) As both counsel acknowledged in their later arguments on the nonstatutory Miranda motion, this "no detention" finding essentially obviated Miranda's application, since the requirements of that case extend only to "custodial" interrogation; the Miranda test of "custody" is functionally equivalent to the Fourth Amendment test of "detention." (See text discussion, post.)

Under these circumstance, counsel cannot be faulted for failing to renew his Miranda challenge at the moment defendant's statement was offered in evidence. No rational interest is served by a conclusion that Miranda arguments were waived.

assure protection of the Fifth Amendment right against self-incrimination under "inherently coercive" circumstances, a suspect may not be subjected to an interrogation in official "custody" unless he has previously been advised of, and has knowingly and intelligently waived, his rights to silence, to the presence of an attorney, and to appointed counsel if he is indigent. Even if the suspect initially waives these rights and responds to interrogation, he may reinvoke them at any time. If he does so "in any manner and at any stage of the process," his request to terminate the questioning or obtain counsel must be "scrupulously honored." (384 U.S. at pp. 444-445, 473-474, 479.) Statement obtained in violation of Miranda are not admissible to establish his guilt.

Here, defendant was read his Miranda rights before the station house interview

began, and he waived them. However, defendant notes that his interrogator, Detective Lewis, later evaded inquiries about his custodial status, then refused to end the interview immediately when defendant asserted his rights to silence and an attorney. Once questioning was suspended, defendant urges, Lewis erred further by engaging him in a new conversation which was reasonably likely to, and did, elicit an incriminating response. Finally, defendant points to his subsequent remark, after a new Miranda waiver was taken, that he could not "fuckin' afford an attorney." This comment, he urges, shows that he misunderstood his right to free appointed counsel. Thus, defendant argues, any waiver of rights he made before giving his statement was not knowing and intelligent.

Miranda applies to the coercive conditions which exist whenever "a person

has been taken into custody or otherwise deprived of his freedom in any significant way." (384 U.S. at p. 444 [fn. omitted], see also p. 467.) The People first urge that since defendant consented to accompany the officers for questioning, and was not under formal arrest, he was not in "custody" for Miranda purposes when he made his incriminating statements.

The contention lacks merit. As with Fourth Amendment claims, the test in case where no formal arrest took place is whether a reasonable person in the circumstances would believe he was not free to leave. (E.g., Berkemer v. McCarty (1984) 468 U.S. 420, 442; Green v. Superior Court (1985) 40 Cal.3d 126, 133-134; People v. Davis (1981) 29 Cal.3d 814, 821, fn. 3; People v. Arnold (1967) 66 Cal.2d 438, 448.)

In deciding the custody issue, the totality of circumstances is relevant, and

no one factor is dispositive. (E.g., California v. Beheler (1983) 463 U.S. 1121, 1125.) However, the most important considerations include (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning. (People v. Celaya (1987) 191 Cal.App.3d 665, 672; People v. Blouin (1978) 80 Cal.App.3d 269, 283; People v. Herdan (1974) 42 Cal.App.3d 300, 306-307.) As the People note, of course, Miranda is not invoked simply because questioning is conducted at a police station, even where suspicion has "focused" on the subject. (E.g., Beheler, supra, 463 U.S. at pp. 1124-1125; Oregon v. Mathiason (1977) 429 U.S. 492, 495.)

Nonetheless, the People's assertion that defendant was not in "custody" for Miranda purposes is foreclosed by our

prior finding that defendant's interrogation occurred during an illegal detention. As noted, the police read defendant his Miranda rights at the station, a strong indication that they themselves considered the interrogation "custodial." Moreover, in an intense interrogation spanning nearly two hours, they led defendant to believe that suspicion had focused on him, that they considered him guilty, and that they had the evidence to prove his guilt in court. As we have previously noted, no reasonable person would have considered himself free to leave under such circumstances. The interrogation was therefore "custodial," and the Miranda safeguards applied.

Assuming defendant was in "custody," the People acknowledge Lewis clearly violated Miranda when he ignored several explicit requests by defendant to remain silent and consult a lawyer. However,

questioning did cease before defendant made any statement urged by either party as incriminating. The People thus contend that defendant's subsequent inculpatory statements were not obtained in violation of Miranda, since they came only after he spontaneously reinitiated contact with the police, then voluntarily, knowingly, and intelligently rewaived his Miranda rights. (See Michigan v. Jackson (1986) 475 U.S. 625, 626; Oregon v. Bradshaw (1983) 462 U.S. 1039, 1041-1046 [plur. opn. of Rehnquist, J.], 1052 [dis. opn of Marshall, J.]; Edwards v. Arizona (1981)451 U.S. 477, 484-485; People v. McClary (1977) 20 Cal.3d 218, 226.)

We disagree. Once the suspect has "expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused

himself initiates further communication, exchanges, or conversations with the police." (Edwards, supra, 451 U.S. at pp. 484-485, italics added.) Once the Miranda right to counsel has been invoked, no valid waiver of the right to silence and counsel may be found absent the "necessary fact that the accused, not the police, reopened the dialogue with the authorities." (Id., at p. 486, fn. 9, italics added; see also Bradshaw, supra, 462 U.S. at pp. 1044-1045 [plur. opn.], 1052-1053 [dis. opn. of Marshall, J.].)[14/]

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14. Arguable differences exist between California and federal law about whether the police may reapproach a suspect in custody once questioning has ceased following an invocation of Miranda rights. In People v. Pettingill (1978) 21 Cal.3d 231, we declared, contrary to Michigan v. Mosley (1975) 423 U.S. 96, that the police may never reinitiate custodial questioning of a person who has asserted his rights to silence or counsel. The United States Supreme Court has since held that one who invoked his right to counsel under Miranda may not be subjected to new attempts at interrogation until a (Footnote continued on next page.)

Moreover, forbidden renewed "interrogation" includes both direct questioning and its "functional equivalent." "That is to say, the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely

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(Footnote continued from previous page.) lawyer has been obtained. (Edwards, supra, 451 U.S. at pp. 484-485.) The more flexible rule of Mosley, which may allow
(Footnote continued on next page.)
(Footnote continued from previous page.) renewed questioning after the suspect is afforded time for reflection, is apparently still in effect when the suspect simply asserted his right to silence. Here, a fair reading of the record indicates that defendant asserted both rights, and the People do not contend otherwise. Hence, both state and federal law suggest the police could not attempt to question him anew. Accordingly we need not determine whether exclusionary rules stemming solely from Pettingill survive Proposition 8. (But see People v. May (1988) 44 Cal.3d 309, 315-320; People v. Warner (1988) 203 Cal.App.3d 1122, 1126-1129.)

[from the suspect's perspective] to elicit an incriminating response from the suspect. . . ." (Rhode Island v. Innis (1980) 446 U.S. 291, 301, fns. omitted.)

Defendant had been subjected to over an hour of intensive interrogation, during which the police repeatedly accused him of lying and professed their firm belief in his guilt. He vehemently maintained his innocence and finally invoked his Miranda rights to silence and counsel. For a significant time, his pleas were ignored, and the questioning continued over his objection.

When interrogation finally ceased, and while he was still in the coercive environment of custody, defendant was taken for "voluntary" fingerprinting. He was then returned to the interrogation area. He was allowed a telephone call to Cornwell, during which Detective Lewis overheard him express his belief that he

was being charged with murder. There is no evidence that defendant sought to discuss the case further with the authorities during this period.

Lewis then asked defendant to re-enter the interrogation room so that Lewis could "tell him a couple of things." No attorney was present on defendant's behalf. After carefully admonishing defendant that he could not be questioned further in light of his invocation of Miranda rights, Lewis nonetheless launched into a monologue on the status of the investigation. He told defendant that a newly contacted witness disputed defendant's claim as to the last time defendant had visited the victims' residence. Lewis then advised, in effect, that defendant was still under suspicion and that investigation of his involvement would continue. As Lewis turned away, defendant's will buckled. He called Lewis

back and blurted "I did it."

We therefore conclude, under Edwards and Innis, that defendant's statement was the result of the authorities' improper resumption of contact and questioning. The Edwards rule renders a statement invalid if the authorities initiate any "communication, exchanges, or conversations" relating to the case, other than those routinely necessary for custodial purposes. (Edwards, supra, 451 U.S. at pp. 484-485; see Bradshaw, supra, 462 U.S. at p. 1045 [plur. opn.].) The record discloses no custodial reason why, once defendant had invoked his Miranda right to counsel, it was necessary to approach him again to "tell him a couple of things" about the investigation. On this basis alone, we must find that defendant's statement contravened the requirements of Miranda.

But Detective Lewis did more. His

aggressive, prolonged interrogation earlier in the evening was calculated to convince defendant that the police believed him a guilty liar. As Lewis knew, the technique had hit home; Lewis overheard defendant tell Cornwell be believed he would be charged with homicide. Though defendant may finally have been advised he was not under arrest, neither had he been released. The pressures to confess, or to appear innocently cooperative, were thus very strong. Under these circumstances, by confronting defendant once again with a discrepancy in his story, Lewis effectively invited defendant to make an "incriminating response" in violation of Innis.[15/]

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15. Innis made clear that "[b]y 'incriminating response' we refer to any response--whether inculpatory or exculpatory--that the prosecution may seek to introduce at trial. As the Court observed in Miranda:
(Footnote continued on next page.)

The People's assertion that Lewis' remarks were neither "designed" nor "reasonably likely" to elicit a damaging reply is unpersuasive. As Innis ruled, the determination whether police words or actions were "reasonably likely" to elicit an incriminating response "focuses primarily upon the perceptions of the subject, rather than the intent of the

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(Footnote continued from previous page.) [¶] '. . . [s]tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word . . . .' [Citation.]" (446 U.S. at p. 301, fn. 5, italics in original.) Nor was the coercive potential of Lewis' conduct so "subtle" that it cannot be deemed the "functional equivalent" of forbidden questioning. (Compare Innis, supra, 446 U.S. at pp. 302-303 [while transporting shotgun-murder suspect immediately after arrest, officers briefly remarked to each other that it would be unfortunate if a child found the missing weapon and was injured; no reason officers should reasonably have expected suspect to respond with offer to lead police to the weapon].)

police." The Miranda safeguards, Innis declared, were intended to "vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. . . ." (446 U.S. at p. 301.) Even if Lewis had no conscious purpose to entice defendant into further discussion (though we can discern no other), he should have realized under all the circumstances that this was a likely result.

The People suggest that because Lewis gave no opportunity for response, and had ended the encounter by turning away, defendant must be deemed to have "initiated" a new conversation by calling Lewis back. Our concurrence in that view would violate the spirit of Edwards. It would allow circumvention of the prophylactic rule against new approaches

by the authorities once the suspect has invoked his Miranda right to counsel.[16] We decline the People's invitation to characterize the facts as they suggest. Defendant's statement was obtained in violation of Miranda and its progeny. His motion to suppress his statement on that ground should have been granted.[17]

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16. Turning away from the suspect under these conditions does not necessarily signal that the interrogator is sincerely precluding a response. Indeed, such a gesture can be an effective means of telling a custodial suspect who is anxious to seem credible that "since you have invoked your right to silence and counsel, and have refused to cooperate, I wash my hands of you." Moreover, though Lewis testified that his purpose in turning away was to arrange defendant's transportation home, nothing in the record indicates this intent was disclosed to defendant.

17. Our analysis makes it unnecessary to determine whether defendant's subsequent rewaiver of Miranda rights was invalid on grounds his statement that he could not "fuckin' afford an attorney" indicates he did not understand that if he was indigent, counsel would be appointed free of charge.

D. Tainted fruit.

Defendant urges that the testimony of John Kennedy, the wallet, and the evidence recovered in the search of defendant's residence were direct products of the illegal police conduct and thus should also have been suppressed. (Wong Sun, supra, 371 U.S. at pp. 485-491.) We disagree. We discuss each claim in turn.

1. Search of residence.

Defendant first urges that the December 14 search of his El Monte residence was invalid. Thus, he contends, the bloody knife and pants and the burned jacket discovered during the search should not have been admitted.

The People rely upon consent to justify the search. Defendant claims, however, that his purported consent to the search was tainted by the asserted constitutional and Miranda violations already discussed. He also contends that

Lewis' technique for obtaining his consent--urging that he should be willing to permit a search if, as he claimed, he had nothing to hide--improperly forced him to choose between his search-and-seizure rights and his right against self-incrimination. (Citing Simmons v. United States (1968) 390 U.S. 377, 390-394 [defendant cannot be forced to admit possessory interest in incriminating item in order to challenge its seizure]; and Crofoot v. Superior Court (1981) 121 Cal.App.3d 717, 725-726 ["consensual" backpack search invalid when consent obtained by implication that refusal to consent would be deemed incriminating].)

Whatever the merits of these arguments, the search is nonetheless supported by the independent consent of the cotenant of the residence, Cindy Cornwell. When one cotenant with joint control of the area to be searched is

present on the premises, he or she may consent to the search despite the absence of others. (United States v. Matlock (1974) 415 U.S. 164, 171, & fn. 7; People v. Haskett (1982) 30 Cal.3d 841, 856.) Defendant conceded to the police that Cornwell had authority to consent, since "[i]t's her house."

Nor was Cornwell's decision to consent tainted by any improper police conduct toward defendant. There is no evidence or contention that Cornwell was improperly coerced to give her consent. It is true that Cornwell was told defendant had already consented, and she apparently withheld her own consent until she consulted with him by telephone. However, during their conversation, which Lewis overheard from defendant's end, defendant simply said that "it was her decision, it was her house, it was okay with him." Nothing in the conversation

implied to her that his cooperation had been coerced, and defendant's words suggested that the matter was entirely in her hands. Thereafter, Cornwell consulted further with her lawyer, who also advised her to consent. Under these circumstances, no reason appears to impute "taint" to Cornwell's independent decision to permit a search. We see no basis to suppress the evidence found in the El Monte residence.[18/]

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18. It is true that the searching officers were alerted to the pants and knife because in his station house interview, which was proceeding simultaneously, defendant had indicated their relevance and where they could be found. We need not suppress the physical evidence thus obtained, however. When advised about these items, the searching officers were already examining the bedroom closet in which they were found. Since both articles contained blood, no competent officer would have overlooked them in any event. Hence, they are admissible under the doctrine of "inevitable discovery." (Nix v. Williams (1984) 467 U.S. 431, 444-450; People v. Superior Court (Tunch) (1978) 80 Cal.App.3d 665, 671-683.)

2. Testimony of Kennedy.

Defendant contends that the testimony of John Kennedy, who drove defendant to and from the murder scene, should also have been excluded, since the police lead to Kennedy derived solely from the illegal questioning. We conclude, however, that Kennedy's identity and testimony would inevitably have been procured in any event.

There is no doubt that the lead by which the police actually reached Kennedy came from defendant. The investigation detectives acknowledged they had not heard of Kennedy until defendant mentioned him twice during the evening of December 14, 1982. Before being transported from El Monte to Fullerton that night, defendant told Detective Lewis that earlier in the week he had used a car belonging to "John's" mother "Mrs. Kennedy" to visit his parents in La Mirada

(a city far from defendant's residence but relatively near the murder scene). Later, during his taped statement, defendant declared that he had driven to the victims' residence in a car "borrowed" from the mother of his friend John Kennedy. Directed by defendant, police found Kennedy's telephone number in defendant's residence and traced Kennedy's address through telephone company records.

Lewis went to Kennedy's residence and confronted him with the suspicion that he was with defendant on the night of the homicides. Kennedy "became visibly shaken and stated that he didn't want to go to jail on that type of thing." He later gave the police a detailed statement under a Miranda advisement.[19] As previously noted, Kennedy testified at defendant's

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19. Although tape-recorded, Kennedy's formal statement to the police is not included in the record.

trial under a grant of immunity.

Even if Kennedy actually came to light through illegal police conduct, however, the evidence demonstrates the reasonable probability that his testimony would have been procured in any event by lawful means. (Nix v. Williams, supra, 467 U.S. 431, 444-450; People v. Superior Court (Tunch), supra, 80 Cal.App.3d 665, 680-681.) Cindy Cornwell knew of Kennedy's relationship to the case; her trial testimony, which defendant has never challenged, discloses that she saw the two men leave the El Monte house and return together on the afternoon and evening of December 7, 1982.

It further appears that Cornwell's knowledge would have been procured by the authorities both promptly and lawfully. Lacking a ready suspect for two brutal homicides, the police were pursuing a broad-based investigation of every person

who might possibly be involved. They had already conducted substantial interviews with William Harbitz, his wife, his brother, and his son.

Defendant, like several members of the Harbitz family, had been identified early as a possible suspect. The detectives had located and conferred with defendant's parents, and had even asked defendant's father to help arrange a meeting with him. Hence, there seems little doubt under "usual and commonplace police investigative procedure" (Tunch, supra, 80 Cal.App.3d at p. 681; see People v. Ramsey (1969) 272 Cal.App.2d 302, 313) that persons in defendant's household would have been identified and contacted.

Contact with Cornwell actually did occur on the evening of December 14, when police asked her consent to search the residence she shared with defendant. Though initially hostile, Cornwell became

cooperative after consulting defendant and obtaining legal advice. During the subsequent lawful search (see discussion, ante), the police found the bloody pants and knife. Asked about a denim jacket belonging to defendant, Cornwell volunteered that she had burned it earlier that evening in a hibachi on the kitchen stove. The police told her she might thereby be implicated. They placed her under arrest and advised her of her Miranda rights. She agreed to cooperate

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and talk about her involvement.[20] The apparent result was her testimony for the prosecution.

We must therefore assume the authorities would have learned of Kennedy and his significance from Cornwell at about the same time he came to light

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20. As with the bloody pants and knife (see fn. 18, ante), the searching officers were alerted to look for the jacket because defendant had disclosed in the still-continuing station house interview that he had worn it on the evening of the homicides. This does not mean, however, that Cornwell's cooperation was the tainted product of illegal conduct. The officers would inevitably have discovered the burned jacket during the December 14 search and would have questioned Cornwell about this unusual and suspicious event. Cornwell herself testified at trial that ". . . I showed them exactly where it was. . . . I took them to the kitchen and showed them, 'Here it is,' and there is little pieces of jacket flying around still. [¶] And I showed them the pieces of the jacket and exactly where it was I had burned it. . . [¶] . . . The evidence was right there in the kitchen when the police had already come." (Italics added.)

through defendant.[21] Even if the lead supplied by defendant provided the leverage necessary to induce Kennedy's cooperation, Cornwell's information was at least as helpful in that regard. (Cf., United States v. Ceccolini (1978) 435 U.S. 268, 277-280; People v. Superior Court (Sosa) (1982) 31 Cal.3d 883, 892-894.) Under these circumstances, no valid purpose of the exclusionary rule is served by permanently suppressing the testimony

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21. Nor need the People prove in detail each step they could have taken without defendant's assistance to locate Kennedy. Cornwell knew Kennedy well; he visited defendant almost daily. As might be expected, Kennedy's telephone number was written down in the residence shared by defendant and Cornwell. With Cornwell's cooperation, and employing "usual and commonplace police investigative procedures" (Tunch, supra, 80 Cal.App.3d at p. 681), it seems reasonably probable that the police would have found Kennedy.

of this important percipient witness.[22/]

3. Wallet. Our determination that Kennedy's cooperation would inevitably have been obtained also answers defendant's contention that the wallet discovered in the sewer gutter under the Temple City freeway offramp should have been suppressed. Kennedy testified at trial to the exact location where defendant disposed of this wallet. It is reasonably probable that, had defendant not done so, Kennedy would have led the police to this obscure spot in time to preserve the wallet's evidentiary value.

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22. The prosecution scarcely mentioned the "inevitable discovery" doctrine below. However, we need not apply the general rule (e.g., Lorenzana v. Superior Court (1973) 9 Cal.3d 626, 640-641) that defenses not raised against the suppression motion in the trial court are waived on appeal. The facts pertinent to our finding of inevitable discovery were fully developed below. Defendant makes no claim that evidence not adduced in the trial court would contradict a finding of inevitable discovery. (See Green, supra, 40 Cal.3d at pp. 137-138.)

E. Prejudice

We have no doubt that the improper admission of defendant's statement warrants reversal, since, at the least, this tainted evidence was not harmless

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beyond a reasonable doubt. (See Chapman v. California (1967) 386 U.S. 18, 24.)[23/]

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23. California has followed the rule that "the improper introduction of a confession [i.e., a declaration of defendant's intentional participation in a criminal act] is considered reversible per se [citations], whereas wrongful introduction of an admission [i.e., the recital of facts tending to establish guilt when considered with the remaining evidence in the case] is deemed prejudicial unless the People show beyond a reasonable doubt that the error complained of did not contribute to the verdict. [Citations.] . . . ." (People v. McClary, supra, 20 Cal.3d 218, 230, italics in original.) This California distinction, never expressly divorced from federal law, is doubtful in light of Rose v. Clark (1986) 478 U.S. 570. Rose emphasized that even federal constitutional errors are not subject to a per se reversal standard unless they render the entire trial "fundamentlly unfair." The court acknowledged that a per se standard applies to introduction of a coerced confession, complete denial of the right to counsel, or adjudication by a biased judge. However, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis. . . ." (Pp. 577-579.) Under this reasoning, if a wrongfully introduced confession is invalid only for Fourth Amendment or prophylactic Miranda reasons, harmless-error analysis may be appropriate. Since we find

(Footnote continued on next page.)

The remaining evidence of defendant's involvement in the stabbings and robberies was undeniably strong. Witness Kennedy drove him to the victims' residence at a time when the homicides most likely occurred. Defendant emerged from the house with a knife, a stab wound, and a suspicious story about what had happened inside. As the two men returned home by freeway, defendant rummaged through wallets and threw them out the car window. He told his girlfriend, Cindy Cornwell, a different story about how he was wounded. Just before the Fullerton officers arrived

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(Footnote continued from previous page.) appropriate. Since we find reversible prejudice in this case under the Chapman standard (Chapman v. California, supra, 386 U.S. 18, 24), we need not address whether defendant's statement was a "confession" or an "admission." Nor need we resolve defendant's claim that his "confession" was coerced by threats, promises, and other psychological ploys which offend fundamental notions of fairness.

to question him, defendant told Cornwell he had done something wrong. Later that evening, and just before officers arrived to search the premises, Cornwell burned a jacket defendant apparently wore on the night he visited the victims. A bloodstained knife and pants soiled with blood similar to that of the victims were found in defendant's residence. A wallet linked to the victims was recovered from an obscure location described by Kennedy.

Yet all this evidence was circumstantial. We cannot be satisfied beyond a reasonable doubt that the jurors would have convicted defendant of the charged crimes had they not heard his taped statement describing in detail his brutal stabbing of the Harbitzes and the taking of their property. Nor, of course, may we assume defendant would have testified, conceding his identity as the killer, had the extrajudicial statement

not been admitted. (People v. McClary, supra, 20 Cal.3d 218, 231.) The convictions must therefore be reversed.

III. CONCLUSION

Our disposition makes it unnecessary to address defendant's remaining contentions. The judgment is reversed in it entirety.

Eagleson, J.

WE CONCUR:

LUCAS, C.J.
MOSK, J.
BROUSSARD, J.
*ARGUELLES, J.

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

C O P Y

PEOPLE v. BOYER

Crim. 24265

DISSENTING OPINION BY PANELLI, J.

I respectfully dissent.

I disagree with the majority's conclusion that defendant's taped statement should have been excluded on Fourth Amendment and Miranda (Miranda v. Arizona (1966) 384 U.S. 436) grounds. In my view, the circumstances of the initial detention and the interrogation do not, as the majority state, add up to an illegal arrest. Whether an illegal detention has occurred must be determined by all the evidence pertaining to the alleged restraint, and the final determination must be made on the basis of the objective reasonableness of the defendant's concern that he was being restrained without his consent. Protestations to the contrary, the majority first question the

voluntariness of defendant's consent to the interview and then focus almost exclusively on defendant's state of mind during the interrogation as he countered the detective's questioning, ignoring the consensual nature of his presence at the station house and ignoring the events subsequent to the interrogation which reinforce a conclusion that no illegal detention had occurred or was occurring. I am troubled and concerned that the subjective standard used by the majority portends a severe limitation, if not elimination, of the voluntary, noncustodial police-station interview.

Here both a magistrate and trial judge reviewed the evidence concerning the interview, at the preliminary hearing and during the Penal Code section 1538.5 suppression hearing that preceded the first trial, and each rejected the defendant's challenge to the incriminating

statements. The hearing judge necessarily made a number of critical findings, assessed defendant's credibility in significant areas, and drew inferences that support his ruling.

I recognize and acknowledge that the scope of review in this court is not simply whether there is substantial evidence in the record to support the trial court's ruling that defendant's statement was not the product of an illegal seizure. In the exercise of our independent judgement as to whether the detention violated the constitutional standard of reasonableness, however, we must accept the trial court's resolution of disputed facts and its assessment of the credibility of witnesses. These are cardinal principles of appellate review. Furthermore, reasonable inferences deduced from the facts as found by the trial court are necessarily supported by substantial

evidence, and a reviewing court is without power to substitute its deductions for those of the trial court. (See People v. James (1981) 29 Cal.3d 99, 107 [voluntariness of consent]; In re Eric J. (1979) 25 Cal.3d 522, 527 [interrogation without Miranda warnings]; People v. Leyba (1981) 29 Cal.3d 591, 596-598 [investigative detention]; People v. Lawler (1973) 9 Cal.3d 156, 160 [patdown search of sleeping bag]; People v. Duren (1973) 9 Cal.3d 218, 241-242 [waiver].)

In my view, defendant's encounter with the police can be divided into three parts: (1) the initial approach and consent to the interview at the station house; (2) the interrogation; and (3) the period that followed the termination of the interview during which defendant incriminated himself.

First, we must accept the trial court's finding that defendant consented

to an interview at the police station and voluntarily subjected himself to interrogation. The manner and circumstances of the transport confirm that the police relied on that consent in transporting him to the station for questioning. Thus, the initial approach to defendant was by plainclothes officers in unmarked cars; defendant requested and was given permission to take his girlfriend with him to the station; she did not go with defendant but was told he would be gone about three hours, which included two hours of travel time; defendant was transported alone in the back seat; there was no cage between the front and rear passenger sections; defendant was not handcuffed or overtly restrained, and the doors of the vehicle were unlocked during transport. At the station, defendant was placed in a room used for noncustodial as well as custodial

interrogation.

The interrogation presents a closer question. Conceding that the interrogation was aggressive and at times accusatory, the record is nevertheless devoid of evidence that defendant involuntarily remained in the room or involuntarily continued to respond to the interrogation. While his repeated question as to his status revealed some doubt on his part as to whether he was free to terminate the interrogation and return home, the fact remains that when defendant stated that he wanted an attorney and wanted to terminate the interview, the officers tuned off the tape recorder and stopped their questioning. As noted above, I believe the majority has erred by focusing almost exclusively on the defendant's state of mind during the interrogation and ignoring the subsequent events which reinforce the conclusion that

no illegal detention had occurred.

Moreover, even assuming, arguendo, that defendant was illegally detained (that is, either physically deprived of his freedom or led to believe that he was so deprived) during the interrogation, it is clear that the incriminating statement was not obtained by exploitation of the illegality.

Thus, once questioning ceased, defendant gave his consent to search the El Monte residence. He was asked and agreed to have fingerprints taken for elimination purposes. During this time he was twice told, in response to inquiry, that he was not under arrest. Importantly, no questioning occurred during the 25 or 30 minute it took to walk defendant over to the jail, fingerprint him, and return him to the station. Thereafter the officer reminded defendant that he could not be questioned further.

The officer also made remarks which reasonably suggested that, while still under suspicion, defendant was no longer the sole focus of investigation and was about to be released. It was at this point, as the officer turned to leave the room to arrange transportation home for defendant, that defendant called him back and blurted out the incriminating statement concerning his involvement in the killings, "I did it." The tape recording machine was then reactivated, and, following a waiver of his Miranda rights, defendant confessed.

The instant case was not defendant's first encounter with the police. He had had prior experience with law enforcement officials in several incidents of arrest or detention. Whatever he may have feared concerning his status during the interrogation, he could not reasonably have believed, in the period following the

cessation of the interrogation, that he was being, or would be detained.

In sum, the findings of the trial court and the inferences that can be drawn therefrom support the conclusion that the defendant's statement was not the fruit of an illegal arrest. Measuring those facts and inferences against the constitutional standard of reasonableness, and exercising independent judgment thereon, I agree with the trial court that the confession is admissible.

Further, I do not agree with the majority that the defendant's confession was obtained in contravention of Miranda. Even if it were decided that defendant was being subjected to custodial interrogation when he made his initial incriminating statement, "I did it," the fact remains that he was given Miranda advisements before the interrogation commenced and the questioning stopped when he invoked his

right to remain silent. The incriminating statement was clearly a spontaneous outburst which falls outside the proscriptions of Miranda. Thereafter defendant voluntarily, knowingly, and intelligently rewaived his Miranda rights.

PANELLI, J.

I CONCUR:

KAUFMAN, J.

S004656

PEOPLE v. RICHARD D. BOYER

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SUPERIOR COURT: Orange County Superior Court

SUPERIOR COURT NO.: C-51866

JUDGE: Hon. James Turner

The information provided here is not intended to reflect that which will appear in the official reports.

APPENDIX B

APPENDIX B

[Filed May 22, 1989]

ORDER DENYING REHEARING

Crim. No. 24265, S004656

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE, Respondent

v.

RICHARD DELMER BOYER, Appellant

Opinion modified. Respondent's petition for rehearing denied.

Lucas
Chief Justice

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,	Crim. 24265/S004656
Plaintiff and Respondent	
v.	(Super. Ct. No. C-15866)
RICHARD DELMER BOYER,	
Defendant and Appellant	

MODIFICATION OF OPINION

BY THE COURT:

The opinion herein, filed March 13, 1989, is modified as follows:

1. Pages 270-271, footnote 13, end of last paragraph on page 270, currently reading:

. . . "custodial" interrogation; the Miranda test of "custody" is functionally equivalent to the Fourth Amendment test of "detention."

shall be amended to read:

. . . "custodial" interrogation; the Miranda test of "custody" is even more

stringent than the Fourth Amendment test of "detention."

2. The second and third full paragraphs on page 271, beginning with the line, "Miranda applies to the coercive conditions . . ." and ending on page 272, shall be deleted and replaced by the following paragraphs:

> Miranda applies to questioning under the coercive conditions of official "custody." (384 U.S. at p. 444 [fn. omitted]; see also p. 267.) "Custody" means "a `formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." (California v. Beheler (1983) 463 U.S. 1121, 1125; Oregon v. Mathiason (1977) 429 U.S. 492, 495; Green v. Superior Court (1985) 40 Cal.3d 126, 133-

136; see also Berkemer v. McCarty (1984) 468 U.S. 420, 439-440.) The People first urge that since defendant consented to accompany the officers for questioning, and was not under formal arrest, he was not in "custody" when he made his incriminating statements.

The contention lacks merit. Where no formal arrest takes place, the relevant inquiry, as with Fourth Amendment claims, "is how a reasonable man in the suspect's position would have understood his situation. [Fn. omitted.] . . ." (Berkemer, supra, 468 U.S. at p. 442; Green, supra, 40 Cal.3d at p. 135, fn. 5.)

3. On page 272, second full paragraph, beginning, "Nonetheless, the

People's assertion . . ." is amended by including the words "tantamount to arrest" at the end of the first sentence. Additionally, the next to last sentence reading,

> As we have previously noted, no reasonable person would have considered himself free to leave under such circumstances.

shall be amended to read:

> As we have previously noted, a reasonable person in such circumstances would only have considered himself under practical arrest.

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

REMITTITUR

No. S004656, Crim 24265

THE PEOPLE, Plaintiff/Respondent, v. RICHARD DELMER BOYER, Defendant/Appellant.	Superior Court No. C-24265

The above-entitled cause having been heretofore fully argued, and submitted, IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the judgment of the Superior Court of the County of Orange in the above-entitled cause, is hereby reversed in its entirety.

I, Robert F. Wandruff, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a

true copy of an original judgment entered in the above-entitled cause on the 13th day of March, 1989.

WITNESS my hand and the seal of the Court, this 22nd day of May, 1989.

ROBERT F. WANDRUFF,
Clerk

By Henrietta A. Cruz
Deputy

Supreme Court, U.S.
FILED
OCT 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-40

In the Supreme Court

OF THE

United States

OCTOBER TERM 1989

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
vs.
RICHARD D. BOYER,
Respondent.

On Petition For a Writ of Certiorari To the Supreme Court of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 89-40

In the Supreme Court

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OCTOBER TERM 1989

THE PEOPLE OF THE STATE OF CALIFORNIA,
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vs.
RICHARD D. BOYER,
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On Petition For a Writ of Certiorari To the Supreme Court of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.
INTRODUCTION

The Petition for Certiorari of the State of California ("State") should be denied. After considering a lengthy, fact-bound record, the California Supreme Court reversed Mr. Boyer's conviction and death sentence for two independent reasons. That court found that there was "flagrant" and "aggravated" "police misconduct" in violation of both the Fourth Amendment and *Miranda v. Arizona,* 384 U.S. 436 (1966). Neither of these independent reasons provides a ground for this Court to hear the case.

The State's petition presents no important federal question for review. The major reason the State proffers in seeking review is its contention that the California Supreme Court applied a subjective standard in determining that the police had seized Mr. Boyer. But the State does not and cannot cite any portion of the court's opinion applying a subjective standard because the court expressed and used an objective, reasonable-man standard. The State's reargument of the facts also ignores portions of the record unfavorable to it, including the finding at the preliminary hearing that Mr. Boyer was "in a posture of custody with the police." (CT 210).[1]

Nor does the Court's *Miranda* analysis present any substantial federal question for review, both because the Court's interpretation of initiation under *Edwards v. Arizona,* 451 U.S. 477 (1981), was correct and because the Court had another independent reason for finding *Miranda* error, to wit, the police interrogated Mr. Boyer after he invoked his right to an attorney. Finally, review is inappropriate because the flagrant police misconduct would require reversal of Mr. Boyer's conviction and death sentence on other grounds as well, which the California Supreme Court did not have to reach.

A. The California Supreme Court's Opinion.

Prior to Mr. Boyer's second trial, Mr. Boyer moved to suppress, among other things, a lengthy tape-recorded (and highly unreliable) confession.[2] After approximately

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[1]Mr. Boyer uses "CT" to cite to the Clerk's Transcript, "RT1" to cite to the Reporter's Transcript of his first trial, and "RT2" to cite to the Reporter's Transcript of his second trial.

[2]The jury in Mr. Boyer's first trial deadlocked and was unable to convict Mr. Boyer of any crime. The trial court then declared a mistrial. (RT1 3148) In the second trial, the trial judge refused to

seven days of hearings on Mr. Boyer's motions to suppress, the trial court denied all such motions by minute orders without any statement of reasons.

On appeal the California Supreme Court, in reversing Mr. Boyer's conviction and death sentence, held that Mr. Boyer's "inculpatory statement to the police was obtained in flagrant violation of the Fourth Amendment and *Miranda*" and that the prosecution's introduction of this evidence in its case-in-chief "was prejudicial by any applicable standard." *People v. Boyer,* 48 Cal.3d 247, 256 (1989). Concerning the Fourth Amendment error, the California Supreme Court found that "[t]he police misconduct leading to [Mr. Boyer's] inculpatory statement was aggravated" and that his "statement was the direct product of the illegal seizure." *Id.* at 262. As to the *Miranda* error, the Court found that the "interrogating detective pointedly ignored defendant's unequivocal attempts to assert his *Miranda* rights to silence and to counsel," and "began a new conversation about the case under circumstances reasonably calculated to elicit an incriminating response." *Id.* at 262. "For each of these reasons independently," Mr. Boyer's "statement was inadmissible at trial as proof of his guilt." *People v. Boyer,* 48 Cal.3d 247, 262 (1989).

On May 22, 1989 the California Supreme Court denied the State's petition for rehearing. On June 21, 1989 the California Supreme Court denied the State's application for a stay pending its application for certiorari, and on July 21, 1989 Justice O'Connor denied the State's application for a stay of the California Supreme Court's judg-

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give the second jury a key defense instruction over which it is clear that the first jury had long debated because the jury sent the trial judge three notes inquiring about that instruction. Without this key instruction, the second jury convicted Mr. Boyer.

ment. This Court may take judicial notice that the State arraigned Mr. Boyer on July 24, 1989 in California Superior Court, Department 5, County of Orange, and a new trial date is set for March 1990.[3]

B. Summary of "Police Misconduct"

The State ignores important facts on which the judgment of the California Supreme Court is based, and Mr. Boyer, therefore, submits the following partial summary of facts relevant to the *Miranda* and Fourth Amendment violations.

On December 14, 1982, the police were investigating the killing of a Fullerton couple, the Harbitzes. After darkness fell, four plain-clothed police officers — concededly without probable cause to arrest — went to Mr. Boyer's home.[4] Two of the officers knocked on the front door while

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[3]At the same time the State pursues this petition for a writ of certiorari, the State has begun proceedings to retry Mr. Boyer in California Superior Court for the County of Orange. Mr. Boyer objects to the State's simultaneous conduct of these two offensives against him; the State is forcing Mr. Boyer to respond on two fronts, which Mr. Boyer contends is or should be violative of interests protected by the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. *Cf. Swisher v. Brady*, 438 U.S. 204, 216 (1978) ("The Double Jeopardy Clause also precludes the prosecutor from 'enhanc[ing] the risk that an innocent defendant may be convicted,' [citation omitted] by taking the question of guilt to a series of persons or groups empowered to make binding determinations"); *United States v. Carter*, 566 F.2d 1265, 1271 (5th Cir.), *cert. denied*, 436 U.S. 956 (1978) ("Although the Government has an obligation to prosecute cases zealously, the Government's primary obligation is to try each case fairly and with due regard for the accused's rights").

[4]The State conceded in the courts below that the police lacked probable cause to arrest Mr. Boyer. *E.g., People v. Boyer*, 48 Cal.3d 247, 262 (1989) (Mr. Boyer's "detention was improper under the

the other two "cover[ed] the rear." (RT1 6, 103-04). Mr. Boyer's front door was not working, and Officer Lewis testified that after Mr. Boyer walked out his back door, the police at the rear of the house said, "Police officers, freeze." (RT1 106). The two officers at the rear of the house walked Mr. Boyer to the front of his home, and one of them said that Mr. Boyer "ran out the back." (RT1 106).

The woman with whom Mr. Boyer lived became hysterical during some discussion with the police about transporting Mr. Boyer from his home to the police station for an hour interrogation and travel time of an hour each way. (RT1 32-33, 38, 112-114). After this, the police frisked Mr. Boyer and told him to sit in the back of an unmarked police vehicle. (CT 1405, RT1 252). Mr. Boyer was not told that he did not have to go to the police station. (RT1 149). At the preliminary hearing, the court found that at this point Mr. Boyer was "in a posture of custody with the police." (CT 210).

When Officers Lewis and Allred arrived at the Fullerton police station with Mr. Boyer, Officer Lewis immediately took Mr. Boyer to a closed interview room. (RT1 119, 257). The room was small, containing two chairs, a small table, and a two-way mirror. (RT1 257). Both officers were present in the interrogation room. (RT1 447). Officer Lewis advised Mr. Boyer of his *Miranda* rights and twice asked, with those rights in mind, whether Mr. Boyer was willing to talk to the police about the "charges" against him. (RT1 217.1). The police surreptitiously tape-recorded the interrogation.

Fourth Amendment because, as the People concede, the police had no legal ground for the restraint.").

After questioning Mr. Boyer about where he was on the evening of the killings, Officer Lewis told Mr. Boyer that a son of the deceased couple had accused Mr. Boyer of the killings. Mr. Boyer denied having killed the Harbitzes, and Officer Lewis then launched into a lengthy and highly accusatory interrogation.

In the face of Mr. Boyer's repeated denials of guilt, Officer Lewis repeatedly used an interrogational technique in which he told Mr. Boyer that the police knew he had killed the Harbitzes and could prove it, though the police had no such evidence. The thrust of the entire interrogation was that the police had the evidence to convict Mr. Boyer of murder, believed Mr. Boyer to be a guilty liar, and the only reason for the interrogation was to find out why Mr. Boyer had done it. Officer Lewis made such statements as "We've got the proof[;] [y]ou're gonna fall on this one Rich[;] [i]t's heavy duty to fall first time around on one like this" (RT1 217.25); "We know how you killed them." (RT1 217.26). When Mr. Boyer asked what evidence implicated him, Officer Lewis said: "Witnesses. You're gonna find that out when you go to court. We're just trying to find out why you did it."(RT1 217.28).[5]

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[5]Samples of the lengthy, highly accusatory interrogation include the following:

Officer Lewis: ... And what I'm here for (cough) is to try to understand why you did it. That's where we're at. I want to know why you did it. This thing of saying "No, no" I — I already know you did it. You know? I've been at this job too long. I wouldn't be in here horseshittin' you on a major case like this if I didn't know you were our guy. Okay? *We know it — we can prove it. And we're gonna prove it, okay?* Now we're by that hurdle.

Eventually, Mr. Boyer asked if he was under arrest. Mr. Boyer asked this question four times, and Officer Lewis testified that he evaded answering these questions in order to prolong the interview. For example, the transcript of the tape-recorded interrogation reflects the following:

Mr. Boyer:	So I'm under arrest.
Officer Lewis:	Do you understand what I'm saying?
Mr. Boyer:	Am I under arrest?
Officer Lewis:	Do you hear what I'm saying?
Mr. Boyer:	Yeah, I hear what you're saying.
Officer Lewis:	That's where you're at. Do you think we were gonna come in here and horse shit you about a thing like this on a major crime?

(RT1 217.28). Later, during the interrogation, when Mr. Boyer again asked if he was under arrest, Officer Lewis refused to answer the question and instead responded with approximately two and one half minutes of silence. (RT1 217.33). Officer Lewis broke this silence by telling

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	What — what I want you to face up to telling me why you did it.
Mr. Boyer:	I didn't do it.
	....
Officer Lewis:	... Let's just get by arguing, you know, about you know — I didn't do it, you did — that kind of horse shit. I know you did it, okay? And I know that it be proven, you understand? We're gonna prove it, okay, and, you know, that's what you're facing. Understand?
Mr. Boyer:	I'm facing murder, I understand that.

(RT1 217.35-37).

his partner to "grab a cup" and asking Mr. Boyer his height and weight. (RT1 217.34). Mr. Boyer again asked if he was under arrest, but again Officer Lewis refused to answer the question and instead asked Mr. Boyer if that was why his girlfriend "went bananas." (RT1 217.34). Mr. Boyer was not told that he was free to go. (RT1 425, 460-61, 464).

Officer Lewis continued aggressively questioning Mr. Boyer, telling him that the police knew he had killed the Harbitzes, that they could prove it, and that the only reason for Mr. Boyer's interrogation was to learn "why" he had done it. Officer Lewis stated, "Understand what you're facing? Murder?" Officer Lewis and Mr. Boyer discussed the death penalty and Officer Lewis said it "[d]epends on why you did it." (RT1 217.32). Officer Lewis also stated: "We're gonna prove it, okay, and, you know, that's what you're facing. Understand?" (RT1 217.36). In response Mr. Boyer said: "I'm facing murder, I understand that." (RT1 217.37).

In the face of Officer Lewis's repeated accusations, Mr. Boyer invoked his right to remain silent and his right to an attorney. Officer Lewis pointedly ignored Mr. Boyer's unequivocal *Miranda* invocations, and Officer Lewis confirmed Mr. Boyer's observation that he was under arrest, as the transcript quoted below illustrates:

Mr. Boyer: Wait a minute, you're sitting there and, and you're not believing a damn word I'll tellin' you, so, how, how can —

Officer Lewis: That's because you've been lying to me. You been lying to me Rich. You know that and I know it. You've been sittin' here lying to me. How in the

hell am I gonna believe you if you keep lying to me? (long pause)

Mr. Boyer: *So, am I under arrest? I'm under arrest. For murder. (inaudible) charges.*

Officer Lewis: *That's where you're at right now.*[6]

Mr. Boyer: Can I have a phone call later?

Officer Lewis: Uh-huh (yes)

Mr. Boyer: *Well, if I'm under, I wanna lawyer —*

Officer Lewis: I didn't think that a,

Mr. Boyer: *If I'm under arrest, I wanna lawyer.*

Officer Lewis: What do you think Bill thinks of ya right now?

Mr. Boyer: Ha, he probably wants to kill me himself. *I wanna lawyer now if I'm under arrest.*

Officer Lewis: What do you mean, if you're under arrest? You saying you don't want a lawyer if you're not under arrest? That's kinda word games isn't it?

Mr. Boyer: Well I, in other words, *I don't wanna say no more, you know. Those are my rights, aren't they?*

Officer Lewis: Sure.

Mr. Boyer: And I'm not trying to get smart with you, ya know.

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[6]At the time Officer Lewis said "[t]hat's where you're at right now" Officer Lewis also "nod]ded]" his head affirmatively. (RT1 258-59, 315-16).

Officer Lewis: That's alright. (inaudible) (pause) Tell me something Rich, you think you're gonna be able to live with it. Up in your head?

Mr. Boyer: Who wants to live, shit.

Officer Lewis: Well,

Mr. Boyer: I'm facing the rest of my life in jail, or, or, or death penalty man. Ha, who wants to fuckin' live.

Officer Lewis: Um, Mr. and Mrs. Harbitz wanted to live.

Mr. Boyer: I know. I'm not saying they didn't. Everyone wants to live, really.

Officer Lewis: They wanted to live. Do you think you had the right to take their life?

Mr. Boyer: *I'm not sayin' no more.* I'm sorry. This is one a, I don't even know a word for it. (long pause)

Officer Lewis: Does your girl friend know what you did?

Mr. Boyer: I didn't even know it. How could she know?

Officer Lewis: Whatta you mean by that, explain that to me. What do you mean by that Rich?

(RT1 217.42-43).

Officer Lewis testified that at this time Mr. Boyer had invoked his right to an attorney under *Miranda*, but Officer Lewis continued the interrogation because he was "seeking an admission." (RT1 185). Officer Lewis contin-

ued the interrogation and finally, after Mr. Boyer again invoked his *Miranda* rights, Officer Lewis temporarily stopped the questioning and left the interrogation room, instructing Mr. Boyer "Okay, just sit there." (RT1 217.45). Next, Officer Lewis again interrogated Mr. Boyer, asking him when he first learned of the killings and whether he had anything to hide; in this way he extracted Mr. Boyer's "consent" for the search of his home, and then ordered Mr. Boyer to "sit tight for a few minutes." (RT1 217.45-46). Officer Lewis's partner then took Mr. Boyer to the jail where the police fingerprinted Mr. Boyer. (RT1 268, 338, 436).

When the officer returned Mr. Boyer from the jail where the police had fingerprinted him, Officer Lewis permitted Mr. Boyer to take a phone call from his girlfriend, during which Officer Lewis heard Mr. Boyer say that he was being charged with two murders. (RT1 127, 208). Officer Lewis then directed Mr. Boyer to return to the interrogation room by stating: "Why don't you step in here for a few minutes, I just want to tell you a couple things." (RT1 444). The California Supreme Court found that after Mr. Boyer was seated in the interrogation room with the door closed and Officer Lewis standing at the door, Officer Lewis "launched into a monologue on the status of the investigation. He told defendant that a newly contacted witness *disputed defendant's claim* as to the last time defendant had visited the victims' residence. Lewis then advised, in effect, that defendant was still under suspicion and that investigation of his involvement would continue. As Lewis turned away, defendant's will buckled," and Mr. Boyer said "I did it." *People v. Boyer*, 48 Cal.3d 247, 274 (1989) (emphasis in original).

After Mr. Boyer's will buckled, Officer Lewis attempted to extract a waiver from Mr. Boyer of his rights. Officer

Lewis said that Mr. Boyer had earlier "remarked something about, a, wanting to stop talking when you, talk with an attorney," and after a brief exchange the following happened.

Officer Lewis: And you're waiving your right to an attorney at this time?

Mr. Boyer: *I can't fuckin' afford an attorney, you know?*

Officer Lewis: *I'm not talking about that.* But you're voluntarily giving me these statements, a, and you already had asked for an attorney previously — you're now waiving your rights to an attorney. With the rights I just read to you.[7]

(RT1 217.48).

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[7]Among the other errors requiring reversal of Mr. Boyer's conviction and judgment of death, which the California Supreme Court did not have to reach in light of the court's holding, are the following: 1) the invalid waiver of *Miranda* rights when Mr. Boyer said he could not afford an attorney and Officer Lewis said he was not talking about that, which prevented Mr. Boyer from understanding that he had a right to appointed counsel, thereby invalidating any waiver, *see People v. Boyer*, 48 Cal.3d 247, 275 n.17 (1989); 2) the fact that Mr. Boyer's confession was involuntary because it was induced by threats of the death penalty, promises of leniency and offers of psychiatric aid in exchange for a confession; 3) the failure to stop the interrogation when Mr. Boyer said he could not afford an attorney, which constitutes an invocation of *Miranda* rights because it is inconsistent with a present willingness to discuss the case; 4) the violation of Mr. Boyer's due process rights because the police, consistent with due process, cannot tell a person he has *Miranda* rights then ignore that person's repeated attempts to exercise those same rights and then use a resulting confession against that person; 5) the *Miranda* violations, which the State essentially acknowledges, taint any subsequent confession or waiver of rights.

II

NEITHER OF THE CALIFORNIA SUPREME COURT'S INDEPENDENT BASES FOR ITS HOLDING, REACHED AFTER REVIEWING A LENGTHY FACTUAL RECORD, PRESENTS A QUESTION FOR THIS COURT TO REVIEW

A. The Court's Fourth Amendment Analysis Was Appropriate

The State's Fourth Amendment contention is puzzling. The State says that "this case presents an important vehicle for this Court to clarify that the subjective beliefs of the individual contacted by the police have no place in the Fourth Amendment analysis of whether a seizure has occurred." Cert. Petition, at 28. The State does not and cannot cite any portion of the California Supreme Court's opinion where any subjective standard was applied because the California Supreme Court applied an objective test.

The California Supreme Court applied an objective, reasonable-man standard in determining that Mr. Boyer had been illegally seized in violation of the Fourth Amendment. The court explained that: "the test of detention under the Fourth Amendment is whether a *reasonable person* in the suspect's position would have felt free to leave" and that Mr. Boyer's "interrogation occurred during an illegal, prolonged detention amounting to arrest." *People v. Boyer,* 48 Cal.3d 247, 267 (1989) (emphasis added). The California Supreme Court in its opinion repeatedly made clear that the court was applying an objective standard. *See id.* at 268 ("Under such circumstances, a reasonable person could only conclude that the police deemed him their sole suspect in a double murder and would restrain and formally arrest him if he tried to

leave."); Modification of *People v. Boyer* Opinion, 48 Cal.3d 972a, 972b (1989) ("As we have previously noted, a reasonable person in such circumstances would only have considered himself under practical arrest.")[8]

In light of the California Supreme Court's application of an objective standard, the State's contention that this case presents an "important vehicle" to clarify that a subjective standard should not be applied is misplaced.

From the faulty premise that the California Supreme Court applied a subjective test, the State seeks to reargue the facts, but the State misreads the record. The Court applied an objective, reasonable-man standard in concluding that "many of the formal indicia of detention or arrest were present during the initial encounter with the officers, his transportation to the Fullerton station, and the ensuing interview." *People v. Boyer,* 48 Cal.3d 247, 267-68 (1989). The court at pages 267-68 noted that the following facts were in the record.

- The manner in which the police arrived at defendant's home, accosted him, and secured his "con-

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[8]The State cryptically argues that "application of the subjective test carried over to the court's analysis of whether respondent's statements were the fruit of unlawful police conduct." (Cert. Petition, at 31). This "attenuation" argument has not been preserved for review because, as the California Supreme Court found, it was not raised by the State in the trial court. *See People v. Boyer,* 48 Cal.3d at 269. This argument also fails because, for among other reasons, the California Supreme Court did not apply a subjective test and because that court found that it "could hardly have clearer proof that defendant's entire statement was the product of a will overborne during an illegal detention," (*id.* at 270), and that "there were no significant intervening events to break the chain of causation between the flagrant illegality of his custodial interrogation and his subsequent statement." *Id.* at 269.

sent" to accompany them suggested that they did not intend to take "no" for an answer.

- The situation quickly ripened into a full-blown arrest inside the station house.
- Defendant was confronted by two officers in a small interrogation room.
- He was informed of his *Miranda* rights.[9]
- He was subjected to more than an hour of directly accusatory questioning, in which Lewis repeatedly told him — falsely — that the police knew he was the killer, had all the necessary evidence, intended to charge him with the crime, and would prove his guilt in court.[10]
- Lewis first ignored defendant's questions about arrest. Then, in what appeared an immediate an-

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[9]Contrary to the evidence, the State says that when Mr. Boyer "stated he wanted an attorney and wanted to terminate the interview, it stopped." Cert. Petition, at 30. As the California Supreme Court found, the interrogating officers "pointedly ignored defendant's unequivocal attempts to assert his *Miranda* rights to silence and counsel." *People v. Boyer,* 48 Cal.3d at 262. Even after Officer Lewis left the interrogation room after Mr. Boyer's invocations, Officer Lewis returned and then questioned Mr. Boyer about knives, when he first learned of the killings and whether he had anything to hide. (RT1 217.45-46).

[10]In light of the above evidence, the State is inaccurate in stating that "there is no evidence that respondent remained in the room involuntarily or involuntarily continued to respond to the interrogation." Cert. Petition, at 29-30. The State's contention is also inconsistent with the evidence that Mr. Boyer had not been told he was free to go or that transportation home would be provided, that when Officer Lewis left the interrogation room, he directed that Mr. Boyer "sit tight" and "just sit there," and that Officer Lewis on one occasion ordered Mr. Boyer to "[g]ive me an answer."

swer to another such question, Lewis said, "That's where you're at right now."[11]

B. The Court's *Miranda* Analysis Was Appropriate

The California Supreme Court found that the "interrogating detectives pointedly ignored defendant's unequivo cal attempts to assert his *Miranda* rights to silence and counsel," and "began a new conversation about the case under circumstances reasonably calculated to elicit an incriminating response." *People v. Boyer,* 48 Cal.3d 247, 262 (1989). The State apparently finds fault with the California Supreme Court's *Miranda* analysis and says that certiorari should be granted "to clarify the scope" of *Edwards v. Arizona,* 451 U.S. 477 (1981), "as to what constitutes initiation of a conversation with police after an individual has invoked his *Miranda* rights." Cert. Petition, at 34.[12]

The State does not show that, in light of the record on appeal, the California Supreme Court erred in construing

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[11]The State is inaccurate in stating that Officer "Lewis also made statements indicating that respondent was not the sole focus of the investigation and suggesting that he was about to be released." Cert. Petition, at 32. Although the State's contention that Mr. Boyer "was about to be released" is a tacit acknowledgment that Mr. Boyer had been seized, there is no evidence of such statements and the contention conflicts with the California Supreme Court's finding that "a reasonable person could only conclude that the police deemed him their sole suspect in a double murder and would restrain and formally arrest him if he tried to leave." *People v. Boyer,* 48 Cal.3d at 268.

[12]In the California Supreme Court, the State virtually conceded *Miranda* error. As the California Supreme Court explained, if Mr. Boyer was in custody "the People acknowledge Lewis clearly violated *Miranda* when he ignored several explicit requests by defendant to remain silent and to consult a lawyer." *People v. Boyer,* at 48 Cal.3d at 272.

the concept of "initiate" within the meaning of *Edwards,* and the State does not acknowledge that the court's finding of a *Miranda* violation was not based solely on the court's interpretation of initiation. The California Supreme Court declined to rest its finding of *Miranda* error solely on its interpretation of the term initiation. In addition, the California Supreme Court found that following a lengthy accusatory interrogation — in which Mr. Boyer had been branded a liar, told that he would be proven guilty of a double murder, and, in effect, told that whether he would be sentenced to death depended on why he did it — the police improperly resumed interrogation of Mr. Boyer (within the meaning of *Rhode Island v. Innis,* 446 U.S. 291 (1980)) when Officer Lewis in effect called Mr. Boyer a liar. The following quotation from the California Supreme Court's opinion illustrates this.

> We therefore conclude, under *Edwards* and *Innis,* that defendant's statement was the result of the authorities' improper resumption of contact and questioning. The *Edwards* rule renders a statement invalid if the authorities initiate *any* "communication, exchanges, or conversations" relating to the case, other than those routinely necessary for custodial purposes. The record discloses no custodial reason why, once defendant had invoked his *Miranda* right to counsel, it was necessary to approach him again to "tell him a couple of things" about the investigation. *On this basis alone, we must find that defendant's statement contravened the requirements of Miranda.*
>
> *But Detective Lewis did more.* His aggressive, prolonged interrogation earlier in the evening was calculated to convince defendant that the police believed him a guilty liar.... [B]y confronting defendant

> once again with a discrepancy in his story, Lewis effectively invited defendant to make an "incriminating response" in violation of *Innis.*

People v. Boyer, 48 Cal.3d 247, 274 (1989) (later emphasis added).

The State does not directly contend that either of the above findings is in error. The State does not seriously dispute the California Supreme Court's finding that Officer Lewis, in violation of *Innis* and *Edwards,* improperly resumed interrogation when he, in effect, called Mr. Boyer a liar, and the State's petition entirely ignores this important fact.[13] Nor does the State's petition address the California Supreme Court's finding that Officer Lewis initiated further contacts and conversations with Mr. Boyer when Officer Lewis directed that Mr. Boyer return to the interrogation room to be advised of a few things. This is police initiation under *Edwards* using any defini-

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[13]The State's apparent contention that this Court's test for interrogation under *Rhode Island v. Innis,* 446 U.S. 291 (1980), does not apply to *Edwards* violations is put forth without any analysis or citation to authority, Cert. Petition, at 42, and in any event the State has waived any such contention because it was mentioned for the first time only in the State's Petition for Rehearing to the California Supreme Court. The authorities are also contrary to the State's argument. *See United States v. Webb,* 755 F.2d 382, 388 (5th Cir. 1985) ("The Supreme Court's interpretation of 'interrogation' [in *Rhode Island v. Innis*] as used in *Miranda* provides the framework for determining whether Webb was interrogated for purposes of the per se rule in *Edwards.*"); *United States v. Walker,* 624 F.Supp. 103, 105 (D.Md. 1985) (police act of showing defendant incriminating document after he requested an attorney constituted interrogation under *Innis* and therefore defendant's statement was taken in violation of *Edwards*); *see also Edwards v. Arizona,* 451 U.S. 477, 486 (1981); *Rhode Island v. Innis,* 446 U.S. 291, 300-01 (1980).

tion of the term. *See Oregon v. Bradshaw,* 462 U.S. 1039 (1983) (plurality opinion).

The State seems to contend that the actions of Officer Lewis in reinitiating a conversation with Mr. Boyer and interrogating him should be ignored because in response to these actions Mr. Boyer said "I did it" and therefore, according to the State, despite the repeated *Miranda* violations Mr. Boyer volunteered his confession. The State's attempt again to reargue its stilted characterization of the facts is not appropriate, especially where the California Supreme Court has already rejected the State's characterization, explaining that "[w]e decline the People's invitation to characterize the facts as they suggest." *People v. Boyer,* 48 Cal.3d at 275.

III.
CONCLUSION

Neither of the California Supreme Court's independent grounds for reversing Mr. Boyer's conviction and death sentence presents an issue for this Honorable Court. The State's petition for a writ of certiorari should be denied.

Dated: October 24, 1989

Respectfully submitted,

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